Challenges, risks and threats for security in Europe : 11th Network Europe Conference Warsaw 19th - 22nd May 2019

Cibotaru, Viorel ; Vincze, Attila ; Saganek, Przemyslaw ; Ceranic, Jelena ; Dolzhikov, Aleksei V ; Douhan, Alena F ; Dvornichenko, Darina ; Barskyy, Vadym ; Fischhendler, Itay ; Murschetz, Verena ; Scheffran, Jürgen ; Baumgartner, Tobias

Abstract: The conditions for security in Europe in the 21st century differ from those in the second half of the 20th century. The consequences of the East-West conflict no longer determine the security agenda. Due to the pan-European process of integration and cooperation, European countries have the chance of a future together in an "area of peace, freedom, security and justice". However, the security situation in Europe is determined by new threats and risks. Comprehensive security means that external and internal as well as civilian and military security aspects are closely linked. It goes beyond traditional security issues and includes, inter alia, instruments of economic, social, and health policy. In addition, today's threats are of cross-boarder nature: Threats like attacks on the security of IT systems, organized crime, and climate change appear to be solvable mainly through international cooperation. Thus, the role of international organizations is becoming more important. The 11th Network Conference analysed the existing security architecture of Europe in the above mentioned political areas. The contributions can be found in this publication.

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Andreas Kellerhals, Tobias Baumgartner

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Preface

ANDREAS KELLERHALS AND TOBIAS BAUMGARTNER

The conditions for security in Europe in the 21st century differ fundamentally from those in the second half of the 20th century. The consequences of the East-West conflict no longer determine the security agenda. Due to the pan-European process of integration and cooperation, European countries have for the first time in history the chance of a future together in an "area of peace, freedom, security and justice". However, the security situation in Europe is determined by new challenges, risks and threats that appear more complex and less predictable. Security policy became a cross-cutting issue that needs to be thought along in various areas of politics and life. Comprehensive security means that external and internal as well as civilian and military security aspects are closely linked. It goes beyond the traditional security issues and includes, inter alia, instruments of economic, social, environmental, media and health policy.

In addition, today's risks and threats are global in nature, conventional attacks have become unlikely in the foreseeable future. All the more challenges arise from phenomena which cannot be managed on the national level: attacks on the security of IT systems; international terrorism; illegal migration, unsuccessful integration; environmental catastrophes; pandemics; organized crime; scarcity of resources like energy, food and water; climate change.

Given the complexity and cross-border nature of the challenges existing security risks appear to be solvable mainly through international cooperation. The role of international organizations is becoming increasingly important. Concerned with the security in Europe are the European Union, the Council of Europe, the United Nations, the North Atlantic Treaty Organisation and the Organisation for Security and Co-operation in Europe.

The 11th Network Conference of Network Europe analysed the cornerstones of an appropriate security architecture for Europe. The conference included presentations on central security issues such as cybercrime and migration as well as on institutional issues such as the concept of a European army and the role of neutral states in the 21st century. This publication comprises the conference contributions.

September 2019

Andreas Kellerhals and Tobias Baumgartner

Authors

Ass. Prof. Dr. Vadym Barskyy, Odessa I. Mechnikov National University, Ukraine

Dr. Tobias Baumgartner, Europe Institute at the University of Zurich, Switzerland

Dr. Jelena Ceranic, Institute for Comparative Law Belgrade, Serbia

Dr. Viorel Cibotaru, European Institute for Political Studies, Moldova

Prof. Aleksei Dolzhikov, St. Petersburg State University, Russia

Prof. Dr. Alena F. Douhan, Belarusian State University, Belarus

Ass. Prof. Dr. Darina Dvornichenko, Odessa I. Mechnikov National University, Ukraine

Prof. Itay Fishhendler, Hebrew University of Jerusalem, Israel

Prof. Dr. Andreas Kellerhals, Europe Institute at the University of Zurich, Switzerland

Prof. Dr. Verena Murschetz, Leopold-Franzens-Universität, Austria

Prof. Dr. Przemyslaw Saganek, Polish Academy of Sciences, Poland

Prof. Dr. Jürgen Scheffran, Institute for Peace Research and Security Policy, Germany

Prof. Dr. Attila Vincze, Andrássy University Budapest, Hungary

Concept of a European Security and Defence Union (ESDU)

VIOREL CIBOTARU

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I. Security Situation in Europe

Defense matters' has become a well-established mantra in capitals across Europe. After more than two decades of 'strategic time-out' characterized by budget cuts and limited expeditionary crisis management abroad, European leaders are once again pressed to focus on how to defend their territories, citizens and open societies.

The security environment in and around Europe has worsened and become more complex. Threats have multiplied. Terrorism, hybrid threats, cyber-attacks or armed conflicts in Europe and our neighbourhood can have a direct impact on the security of European citizens. When it comes to security the core interests of all EU Member States are inseparably linked.

Today's threats do not know borders and no EU Member State can tackle them alone. A European Union that protects is what citizens expect the EU and all Member States to deliver.

French President Emmanuel Macron's recent call for the creation of a 'true European army' was dramatically echoed by German chancellor Angela Merkel in mid-November and has brought the debate over a shared European military back into the public eye. This may mark a watershed moment in European politics. The debate has never been far from media headlines during the European Commission Presidency of Jean-Claude Juncker, but as the past four years have seen seismic changes in global and European politics, the advent of a true European military now seems to be more likely than ever before. With the United Kingdom's imminent departure from the Union, increasing instability in the transatlantic relationship , the fear of Russian military encroachment, and a worsening EU-Turkey relationship, the question in EU institutions increasingly seems to be not 'if' a European army ought to exist – but 'when' and 'how'.

II. European Security and Defence Union

1. Current discussion

The current discussion is driven by a recognition that the EU needs to do more in the area of security and defence. Three developments in particular have pushed ESDU to the top of the Union's agenda. Firstly, its failure to deal with the 2011 Libya crisis and the 2014 Ukraine crisis without the United States (US).

Secondly, the United Kingdom's (UK's) decision to leave the EU, or 'Brexit', which means that the Union will lose its strongest military power and the main obstacle for deeper defence cooperation.

Thirdly, concerns about America's willingness to defend its European allies under President Donald Trump in all circumstances.

ESDU is not a new idea. It was first discussed during the Convention on the Future of Europe (CFE), which drafted the EU's failed constitution in 2001-2003. During the CFE, France and Germany called for developing an ESDU on the grounds that 'a Europe fully capable of taking action' was not feasible without 'enhancing its military capabilities'.

The current ESDU discussion differs from the 2002-2006 one because there is now much broader support for it. Since 2016, the European Commission, the European External Action Service (EEAS), the EP, the Council of the EU, and various EU member states have expressed support for the ESDU.

The European People's Party (EPP), which has been leading the debate on EU defense since 1992, called for an ESDU 'worthy of that name' in June 2015. Germany's 2016 security policy white paper also mentioned that achieving ESDU is Berlin's 'long-term goal'. Furthermore, Commission President Jean-Claude Juncker's 2017 State of the Union address stated that the EU needs 'a fully-fledged European Defence Union' by 2025.

The call by Macron for a 'true European army' marks a significant shift in tone in French attitudes toward the idea of a shared European military. Whilst European military cooperation has existed since the Union's foundation, the concept of a single, unified military was considered something of a taboo subject. However, with Merkel's statement on 13 November in Strasbourg seeming to intentionally echo the language used by Macron, Europe could be seeing the first unambiguous signs of a much more cohesive Franco-German approach to a European military project than has historically been the case.

There were indications that a significant sea change in European attitudes toward shared defence was coming; the signing of the Permanent Structured Cooperation (PESCO) agreement by twenty-three of the twenty-eight European Union Member States was a watershed moment in European history and politics. In brief, whilst PESCO did not directly establish a European army, it did create unprecedented binding obliga-

tions for formal security cooperation between Member States, and contained pledges for increased defense spending across the Union that might ultimately lay the foundation for a European army in all but name. The groundwork for "permanent structured cooperation" between Member States in military affairs has existed since 2009 , and since 2003 thirty-four joint missions by EU Member States have taken place under the auspices of the Common Security and Defence Policy (CSDP). However, PESCO's signing into effect may well be seen by future generations as the harbinger of a European army given the unparalleled cooperation in security and defense to which it aspires. Enshrined within PESCO are binding plans to develop joint rapid reaction forces, new state-of-the-art European drones and armoured vehicles, and the creation of centralised European military logistics and medical command centres among other shared projects.

It should also be noted that PESCO is not the only avenue for developing military cooperation above and beyond the usual joint missions taking place under the CSDP framework. In February 2017, the Czech Republic and Romania contributed soldiers and material to a growing multinational military division led by Germany. This was not an unprecedented development – the Netherlands had previously contributed two army divisions to the same multinational brigade under the Bundeswehr. However, the fresh expansion of the multinational military unit led by Germany sparked media controversy for appearing to silently constitute and assemble a European army in all but name under German control. Naturally, this development gave fuel to another controversial issue at the heart of the European army concept: the issue of sovereignty.

2. Purpose of the EDSU

As the 2016 EPP Paper on Security and Defence states, this is the purpose of the EU's Common Security and Defence Policy (CSDP). Given that it should also be the main purpose of ESDU, it should be created around

two main deliverables that would boost the EU's 'defence' dimension: (1) an unqualified mutual defence commitment, and (2) a military Schengen area.

First, given that not all EU members are NATO members and therefore not under the protection of Article 5 of the North Atlantic Treaty, ESDU participants should commit to defending each other through all means in their power, including military force, in the event that one of them becomes subject to armed aggression.

Although this sounds similar in tone to Article 42(7) of the Treaty on EU (TEU), the so-called mutual assistance clause, it is not. Article 42(7)'s mutual assistance commitment is rendered hollow by its second paragraph, which states that it 'shall not prejudice the specific character of the security and defence policy of certain Member States'. This means that the Article 42(2) can be interpreted in a highly subjective way. Thus, a genuine ESDU should include an unqualified mutual defence commitment.

Second, in ESDU, there should be minimal to no obstacles to moving military forces and equipment from one state to another. At the moment, such movement is hindered by various bureaucratic requirements, such as passport checks at some border crossings.

Furthermore, infrastructure problems, such as roads and bridges that cannot accommodate large military vehicles, create additional obstacles to the movement of military personnel and equipment in Europe. This is something that has also been called for by NATO, which means that it would also further boost EU-NATO cooperation.

ESDU should be created around an unqualified mutual defence commitment and a military Schengen area. These would form the core of the new defence core group, or the "Euro" of a "Defence Eurozone".

In addition, ESDU could include looser commitments, such as a commitment by the participating EU member states to invest a certain percentage of their Gross Domestic Product (GDP) in defence; and a commitment

to improve the EU's existing rapid response capabilities, particularly the battlegroups. However, given that such commitments could eventually be ignored, they should not form the backbone of an ESDU.

III. Permanent Structured Cooperation

1. Deepening defence cooperation among EU member states

In light of a changing security environment, the EU Global Strategy for Foreign and Security Policy (EUGS) started a process of closer cooperation in security and defence. The EU Member States agreed to step up the European Union's work in this area and acknowledged that enhanced coordination, increased investment in defence and cooperation in developing defence capabilities are key requirements to achieve it. This is the main aim of a Permanent Structured Cooperation on Security and Defence (PESCO), as outlined in the Treaty of the EU, Articles 42 (6) and 46, as well as Protocol 10. Through PESCO, Member States increase their effectiveness in addressing security challenges and advancing towards further integrating and strengthening defence cooperation within the EU framework.

This will thus enhance the EU's capacity as an international security actor, contribute to the protection of EU citizens and maximise the effectiveness of defence spending. The difference between PESCO and other forms of cooperation is the legally binding nature of the commitments undertaken by the participating Member States. The decision to participate was made voluntarily by each participating Member State, and decision-making will remain in the hands of the participating Member States in the Council. This is without prejudice to the specific character of the security and defence policy of certain EU Member States.

On 13 November 2017, as the first formal step towards setting up PESCO, Ministers signed a common notification on the PESCO and handed it over

to the High Representative and the Council. The notification sets out a list of 20 more binding common commitments in the areas of defence investment, capability development and operational readiness. It also contained proposals on the governance of PESCO and its principles. Based on this notification, on 11 December 2017, the Council took the historic step to adopt a decision establishing PESCO and its list of participants. A total of 25 Member States decided to participate in PESCO.[1]

2. Structure and Governance

PESCO has a two-layer structure:

• Council Level: Responsible for the overall policy direction and decision-making, including as regards the assessment mechanism to determine if participating Member States are fulfilling their commitments. Only PESCO members are voting, decisions are taken by unanimity (except decisions regarding the suspension of membership and entry of new members which are taken by qualified majority).

• Projects Level: PESCO's effectiveness will be measured by the projects it will develop. Each project will be managed by those Member States that take part in it, under the oversight of the Council. To structure the work, a decision on general governance rules for the projects has been adopted by the Council.

PESCO Secretariat: The European Defence Agency (EDA) and the EEAS, including the EU Military Staff, are jointly providing secretariat functions for all PESCO matters, with a single point of contact for the participating Member States. Implementation of PESCO: On 6 March 2018, the Council adopted a Recommendation which sets out a roadmap for the further implementation of PESCO.

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[1] The participating Member States are: Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Spain and Sweden.

PESCO projects: A Member State owned process > PESCO projects must have a clear European added value in addressing the Union's capability and operational needs, in line with the EU Capability Development Priorities and CARD. The projects contribute to fulfilling the more binding commitments and to achieving the EU Level of Ambition. > On 6 March 2018, the Council formally adopted the first set of 17 different projects and the project members for each of them. A second set of another 17 projects is was adopted by the Council on 20 November 2018.

The 34 projects in the areas of capability development and in the operational dimension range from the establishment of a European Medical Command, an EU Training Mission Competence Centre, Cyber Rapid Response Teams, Mutual Assistance in Cyber Security, Military Disaster Relief or an upgrade of Maritime Surveillance to the creation of an European Military Space Surveillance Awareness Network, a joint EU Intelligence School, specialised Helicopter Training as well as co-basing, which would allow the joint use of national and overseas bases.

Third States participation in PESCO projects While membership of the Permanent Structured Cooperation is only for those Member States who have undertaken the more binding commitments, third States may exceptionally participate at the level of PESCO projects. In principle before the end of 2018, the Council will agree on the general conditions under which third states may exceptionally be invited to participate in PESCO projects. It is first up to members of individual projects to consider inviting a third State that meets the general conditions. The Council will decide whether a third State meets these requirements. Following a positive decision, the project may then enter into administrative arrangement with the concerned third State, in line with procedures and decision-making autonomy of the Union. PESCO is both a permanent framework for closer cooperation and a structured process to gradually deepen defence cooperation within the Union framework. It will be a driver for integration in the field of defence. Each participating Member State provides a plan for the national contributions and efforts they have agreed to make. These national implementation plans are subject to regular assessment. This is

different from the voluntary approach that is currently the rule within the EU's Common Security and Defence Policy. PESCO is designed to contribute to making European defence more efficient and to deliver more output by providing enhanced coordination and collaboration in the areas of investment, capability development and operational readiness. Permanent structured cooperation in this domain will allow for decreasing the number of different weapons' systems in Europe, and therefore will strengthen operational cooperation among Member States, connect their forces through increased interoperability and enhance industrial competitiveness. PESCO will help reinforce the EU's strategic autonomy to act alone when necessary and with partners whenever possible. Whilst PESCO is underpinned by the idea that sovereignty can be better exercised when working together, national sovereignty remains effectively untouched. Military capacities developed within PESCO remain in the hands of Member States that can also make them available in other contexts such as NATO or the UN.

3. Relevance for the security of the EU and its citizens

On 25 June 2018, the Council adopted a Decision establishing the common set of governance rules for the PESCO projects. It includes an obligation to report on progress to the Council once a year, based on the roadmap with objectives and milestones agreed within each project.
– Each year by November, the process to generate new projects will be launched in view of updating the list of projects and their participants by the Council. Assessment criteria have been developed by the PESCO secretariat to inform the evaluation of the project proposals by the participating Member States.

4. Part of a comprehensive defence package

PESCO is closely connected to the new Coordinated Annual Review on Defence (CARD) and the European Defence Fund (EDF). They are com-

plementary and mutually reinforcing tools supporting Member States' efforts in enhancing defence capabilities: CARD, run by the European Defence Agency, through the systematic monitoring of national defence spending plans, will help identify opportunities for new collaborative initiatives.

The EDF provides financial incentives for Member States to foster defence cooperation from research to the development phase of capabilities including prototypes through co-financing from the EU budget. PESCO projects may benefit from increased EU co-financing, which could amount to 30% – instead of 20% – for prototypes.

PESCO will develop capability projects responding to the EU priorities identified by EU Member States through the Capability Development Plan, also taking into account the results of the Coordinated Annual Review on Defence. Eligible projects could also benefit from financing under the EDF, as explained above.

EU-NATO Cooperation Today and Tomorrow

ATTILA VINCZE

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I. Introduction

The EU and NATO have 22 members in common, which makes a co-operation not only reasonable but to some extent also necessary. In this sense, the 2016 NATO summit welcomed an enhanced co-operation between NATO and the EU. The conclusions of this summit recognised „the importance of a stronger and more capable European defence, which will lead to a stronger NATO, help enhance the security of all Allies, and foster an equitable sharing of the burden, benefits and responsibilities of Alliance membership". The NATO also encouraged further mutual steps in this area to support a strengthened strategic partnership.[1]

On 8 July 2016, the President of the European Council and the President of the European Commission, together with the Secretary General of NATO signed a Joint Declaration in Warsaw in order to reinvigorate the EU-NATO strategic partnership. Based upon this declaration a number of

[1] Warsaw Summit Communiqué, Issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw 8-9 July 2016, para 124-126.

further actions and proposals were endorsed by the EU and NATO. On 10 July, 2018, the President of the European Council and the President of the European Commission, together with the Secretary General of NATO signed a second Joint Declaration in Brussels calling for swift and demonstrable progress in implementation.

As the Delors Institute persuasively put it, complex threats call for smart division of labour, as "neither NATO nor the EU has the toolkit to address these increasingly complex threats alone".[2] And indeed there is considerable ongoing practical co-operation between the EU and NATO: the EU has considerable soft power and economic tools to contribute to the aims of NATO, and NATO has the capabilities to support the EU as happened during the migration crisis as ships were deployed on the Aegean Sea to assist Greece and Turkey, as well as the European Union's border agency FRONTEX. The EU also supported NATO's manoeuvres in Afghanistan with its diplomatic and economic capabilities. Nonetheless, it would be hard to overlook the tensions between (and within) the NATO and the EU: earlier Iraq, later Libya and most recently Iran are probably the most obvious examples.

Moreover, it is an ongoing issue since the 1960es that Europe has to develop its own defence capabilities, and cannot rely on the US. President Kennedy claimed in 1963 that the US cannot „continue to pay for the military protection of Europe while NATO states are not paying their fair share and are living off the fat of the land." President de Gaulle also emphasized that Europe has to take its defence into its own hands.[3] Not only did Mr. Trump tweet furiously a very similar message after his election victory, but European leaders have also questioned America's commitment during the few last years. This worry was voiced most obviously by Mrs. Merkel in the European Parliament in November 2018. There is even some detachment of the US from the defence of Europe, and there is

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[2] Jacques Delors Institute Berlin: Three arguments for an ever closer EU-NATO cooperation, <https://www.delorsinstitut.de/en/publications/three-arguments-for-an-ever-closer-eu-nato-cooperation/>.

[3] Jackson Julian, A Certain Idea of France: The Life of Charles de Gaulle, London 2018, p. 743.

also an observable wish for Europe to assume responsibility for her own defence, as the 70 years of NATO alliance created a kind of path towards dependency in co-operation. The following essay will firstly take a historical look at the defence co-operation, set out the legal framework of the co-operation, and consider the political context of it.

II. A Historical Overview[4]

Today's hotchpotch relationship between NATO and the EU goes back to the founding years, and it is hard to understand without taking the historic events into account.

Just as the economic integration among the founding Member States of the ECSC and EEC were forged by historic pathways, amongst long-term interests and the at that time obvious threats from the Soviet Union, the military alliance was born under the very same conditions. As the Soviet threat became imminent, Harry S. Truman, the then President of the US expressed his concerns regarding Greece and Turkey in a speech to Congress on 12 March 1947 and said that "it must be policy of the United States to support free people who are resisting attempted subjugation by armed minorities or by outside pressure". This doctrine, which required and offered economic and military assistance, framed the US policy during The Cold War.

A first European military alliance after World War II begins with the Treaty of Dunkirk between France and the UK, which later encompassed the Benelux States and so formed the WEU. This Treaty was established on the principle of mutual defence similarly to NATO, but its members were solely Western European countries.

As the first proxy war between the capitalist West and the communist East broke out in Korea, the French Prime Minister *René Pléven* made an unofficial proposal for a European Defence Community (hereinafter EDC)

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[4] For a detailed analysis see: Trybus Martin, European Union Law and Defence Integration, London 2005, p. 65.

with the participation of the six ECSC Member States. The EDC Treaty had a supranational character, established common institutions, common armed forces and a common budget, something which is nowadays still trying to be achieved.

All six governments of the ECSC signed the EDC Treaty in May 1952. The German, Dutch, Belgian and Luxembourg parliaments had also ratified it by summer 1954, and, as it is well-known, the French Parliament declined its consent. After this debacle, an alternative was sought for addressing the German contribution to the defence of Western Europe, thus Germany and Italy had been inclined into a revised Brussels Treaty establishing the Western European Union (hereinafter WEU), and Germany was also admitted into NATO.

A duplication of the military alliance, a WEU in addition to NATO has been criticized as a waste of resources, a critique which is also brought up nowadays regarding the European Common Defence Policy which is that it would result in an unnecessary duplication of existing NATO capabilities.

Nonetheless, the WEU was a reaction to the failure of the EDC. As political integration had been cooled down, and European integration was focused on the Common Market, defence integration was not a central topic anymore. Besides Ireland, which has been neutral in international relations since the 1930s,[5] all EEC Member States were members of NATO as well, and hence the unsolved question of military alliance did not make too much trouble: defence and military questions were dominated by the conflict with the Soviet Union, and the common enemy overshadowed the existing tensions within the alliance.

This *modus vivendi* was ended by the collapse of the communist regime, which required some new objectives of the European integration as well.

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[5] Cottey Andrew (Ed.), The European Neutrals and NATO, Non-alignment, Partnership, Membership?, London 2018, pp. 158-159.

The reference to the WEU was repealed by the Treaty of Nice signalling the wish of the EU to assume direct responsibility for its own defence and operational capabilities.

Besides establishing European citizenship and launching the new European currency, defence integration was also supposed to be reinvigorated by the Maastricht Treaty. The Maastricht Treaty was concluded with the aim „to implement a common foreign and security policy including the eventual framing of a common defence policy, which might in time lead to a common defence thereby reinforcing the European identity and its independence in order to promote peace, security and progress in Europe and in the world". The last 26 years did not suffice to live up to this promise and expectation, and the EU still lacks military capabilities.

Security questions were defined very narrowly however, and they included merely the so-called Petersberg Tasks: "humanitarian and rescue tasks, peacekeeping tasks and tasks of combat forces in crisis management, including peace-making."[6] Furthermore a possibility for co-operation in the field of armaments was mentioned,[7] which does not mean the same thing as common capabilities.[8]

The EU was also obliged to respect the obligations of certain Member States, which see their common defence realised in NATO, and the CFSP had to "be compatible with the common security and defence policy established within the NATO framework".[9] Moreover, the common defence should "not prejudice the specific character of the security and defence policy of certain Member States" which was intended to take into account the neutrality of Ireland, and later that of Austria, Finland, and Sweden. Moreover, it could have also been constructed in favour of the special status of the United Kingdom and France as nuclear powers and as permanent members of the UN Security Council.

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[6] Art. 17.2 TEU, Maastricht Version.

[7] Art. 17.1 subparagraph 4 TEU, Maastricht Version.

[8] Trybus (footnote 4), p. 65

[9] Art. 17.1 subparagraph 3 part 2 TEU, Maastricht Version.

The Treaty of Amsterdam somewhat broadened the powers of the EU, and enabled it to conclude international agreements with one or more states or an international organisation, which also might have included NATO.

The Lisbon Treaty, which in essence kept the former pillar structure regarding the Common Foreign and Security Policy,[10] widened the scope of possible enhanced co-operation to cover the whole CFSP field, including defence,[11] and added a new inbuilt closer cooperation: the 'permanent structured co-operation' in the field of defence,[12] and in doing so significantly modified the provisions of the TEU on European Security and Defence Policy (ESDP).[13]

III. Legal Framework: The Bonds That Tie

It goes without saying that every EU measure must be grounded upon a legal base set out in the Treaty.[14] A legally binding, formal co-operation between NATO and the EU would request an international agreement. This could be eventually concluded by invoking Art 37. TEU.[15]

According to Art 37 TEU, the Union may conclude agreements with one or more States or international organisations in areas of Common Foreign and Security Policy. As The Common Security and Defence Policy is an integral part of the Common Foreign and Security Policy according to Article 42 para 1 of the TFEU, international agreements might be also signed in the areas of The Common Security and Defence Policy. The aims of The Common Security and Defence Policy are peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter, which are by and large com-

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[10] Piris Jean-Claude , The Lisbon Treaty, A Legal and Political Analysis, Cambridge 2010, p. 66.

[11] Piris (footnote 10), p. 89.

[12] Piris (footnote 10), p. 91.

[13] Piris (footnote 10), pp. 265-279.

[14] Chalmers Damian/Tomkins Adam, European Union Public Law: Text and Materials, Cambridge 2007, p. 140.

[15] Kaufmann-Bühler, Art 37 para 52, in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim, Das Recht der Europäischen Union: EUV/AEUV, München.

patible with the purpose of the NATO-Treaty, as it was agreed with the intention „*to unite […] efforts for collective defence and for the preservation of peace and security*". Thus, the EU has the necessary power to conclude international agreements with NATO.

Contrary to the earlier version of the Treaty on the European Union, Article 37 TEU does not contain any specific procedural rules regarding the treaty-making, which makes Art 218 TFEU and Art 31 TEU applicable and requires basically unanimity[16] of all Member States except for Denmark which opted out of common defence policy.

Reaching this unanimity might be difficult for different reasons: first, Member States who consider themselves neutral might be constitutionally barred[17] from underwriting defence agreements with NATO, and second, the very different (geo)political interests of the Member States might hinder achieving unanimity.

Ireland, Finland, Sweden, Austria, Malta and Cyprus are neutral states which is either constitutionally safeguarded or they pursue neutrality as a longstanding policy. This neutrality, irrespectively its practicality in modern times, is defined in international law as the status of a state which is not participating in an armed conflict between other states.

Therefore, a neutrality might bar member states of the EU from participating in some forms of military co-operation, especially with NATO: if neutrality bars them from being a member of NATO, it might also hinder them from co-operating with NATO. Art 42 TEU Para (2), the so-called

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[16] Heintschel von Heinegg Wolff Art 37, rn 8, in Matthias Pechtstein, Carsten Nowak, Ulrich Häde, Frankfurter Kommentar, EUV/AEUV/GRC, Tübingen 2017.

[17] The federal constitution commits Austria to comprehensive national defence in order to safeguard permanent neutrality (Art 9a B-VG). Art 1 para 3 of the Maltese Constitution is probably more specific regarding the content of the neutrality. It reads as follows: „Malta is a neutral state actively pursuing peace, security and social progress among all nations by adhering to a policy of non-alignment and refusing to participate in any military alliance". Moreover, the Constitution is very strict regarding the use of Maltese military facilities.

'Irish Clause' intends to address this tension within EU foreign policy,[18] according to which the policy of the EU „shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and can be compatible with the common security and defence policy established within that framework."

It would be hard to conceive more Delphic words. Basically, it says that both a membership in NATO and a non-membership will be tolerated and is compatible with the EU membership: every European country irrespective of its membership in NATO or its neutral status may join the EU. This is of course to welcome countries, but the question at hand is whether this flexibility is compatible with an even deeper military co-operation within the EU. If the EU evolves common military capabilities, and a defence concept similar to Art V of the NATO Treaty, those EU member states which are not members of NATO will be de facto members of the alliance.[19]

Considering that all those Member States of the EU which did not opt out from CFSP are entitled to vote in CFSP issues, including any forms of co-operation with NATO, and are obliged to take a fair share of the financial and probably military burdens, it is easy to foresee some forms of tension in the case of a more and more intensive co-operation between the EU and NATO. A substantial pooling of capabilities and military command might cause tensions of constitutional significance hindering some Member States from participating similarly to the deepening of the monetary union: as too was needed in order to beef up European financial capabil-

[18] Although it is called Irish clause because Ireland was the first member state of the EU which pursued neutrality, the concessions are in favour of all neutral member states of the EU, cf. Peter Hilpold, Österreichs Neutralität nach Lissabon, Österreichische JuristenZeitung 2010, 590 (594) Theo Öhlinger, Österreichs Neutralität in der Europäischen Union, Zeitschrift für Öffentliches Recht 2018, pp 621-635.

[19] Malta does not even participate in PESCO because of her policy of neutrality: Brendan Flynn, PESCO and the Challenges of Multilateral Defence Cooperation for Ireland: More of the Same or Sea Change?, Irish Studies in International Affairs , Vol. 29 (2018), 73-95, p. 75.

ities and to expand monetary powers by quantitative easing, many Member States worried as to whether these measures are compatible with their own constitutions and the powers transferred to the EU. A very similar scenario is possible in military co-operation, as well.

A further obvious challenge is of course the unanimity on which The Common Foreign and Security Policy is based, requiring all Member States (except Denmark) to agree. Putting aside legal and constitutional complications following from eventual neutrality, there are obvious political obstacles too, namely the veto power of a minority of EU Member States. The qualified majority voting, which was adopted for the single market by the Single European Act and step by step expanded to further areas, offers some useful lessons in this respect. The Ioannina Compromise of 1994,[20] which was also overtaken by the Lisbon Treaty in an updated form, shows that some Member States might find it hard not to make use of the veto power in case of essential interests. Moreover, even if there is only one Member State opposing EU policy, this Member State might challenge the decision made in the Council before the CJEU,[21] or may simply ignore a decision, as some central European states did with the refugee quotas in 2015, and refused to accept the allocated migrants.

Besides those Member States of the EU which might not be fully interested in a co-operation with NATO, NATO Member States which have eventual political conflicts with some EU Member State may create a further obstacle. It is worthwhile to look at the conflict regarding the name of the country which was called Macedonia earlier and is Northern-Macedonia. This conflict blocked any integration of Northern-Macedonia for a very long time very effectively. Turkey, a member state of NATO, is one obvious open wound, a country which is officially a candidate for EU-

[20] Which was a reincarnation of the Luxembourg compromise, cf RUDOLF STREINZ, Die Luxemburger Vereinbarung, München 1984.

[21] See e.g. the Czech Republic's action against EU legislation introducing more stringent rules for the acquisition and possession of firearms, which at least shows how sensitive issue is the defence industry (case C-482/17).

Membership but accession did not come nearer during the last years. In a similar situation, signing an international treaty or blocking the ratification might be used as leverage in other areas of political co-operation.

These issues, of course, raise our attention to the political dimension of co-operation.

IV. Co-operation: Capabilities, Command and Trust

A sincere co-operation with the NATO presupposes "a stronger and more capable European defence" according to the NATO Warsaw Summit Communique. A stronger and more capable defence requires a meaningful European Army based upon economies of scale comparable to the US, Russia or China. It is remarkable that the EU has as many citizens as the USA and Russia combined, but its military capabilities are far from either of them because the EU lacks economies of scale. This, of course, cannot be achieved as long as every European national army disposes of every kind of capabilities. Therefore pooling and sharing capabilities is also needed, and the building up of European defence capabilities.

This idea is also part of a Franco-German plan called "permanent structured co-operation", or PESCO[22] that aims to allow a kind of enhanced co-operation towards greater integration of their military capabilities. It is based upon a reactivated provision of the Lisbon Treaty that allows groups of EU countries to make progress on policies led by a vanguard of states.[23] By and large, there have basically been two concepts of how to co-operate: either a large group of states should engage in a relatively limited types of cooperation, or a smaller number of states should become involved in a more ambitious defence cooperation.[24]

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[22] Blockmans Steven, The EU's modular approach to defence integration: An inclusive, ambitious and legally binding PESCO? 55 Common Market Law Review (2018), pp. 1785–1826.

[23] Flynn (footnote 19), p. 74.

[24] Flynn (footnote 19), p. 74.

Enhanced defence co-operation puts emphasis on pooling and sharing of resources and capabilities. It is very tempting in theory but is a much harder nut to crack in practice. In theory, it would allow that some Member States specialize in different capabilities, which enable them to make use of economies of scale and economies of scope, and the Member States together can build up a much more vigorous and capable army in comparison with the present situation of 28 different national military forces.

This kind of pooling and sharing relies extremely on European (or from a very national perspective foreign) capabilities, on the very deep trust in the other Member States that they unconditionally will defend each other. Specializing in some areas namely also means neglecting other capabilities, relinquishing know-how, and giving them up at the end of the day. This dilemma is very similar to the 1950s and 1960s, as the French President Charles de Gaulle worried about the reliability of the American nuclear deterrence, because it was far from certain that the USA would risk atomic warfare if the Soviet Union would limit a nuclear first strike to Europe. General de Gaulle was therefore obsessed with building up French nuclear deterrence independent from the will of a foreigner even if this was an allied force, such as the United States. One might also take the example of Ukraine, which gave up its nuclear arsenal for security guarantees according to the so-called Budapest Memorandum signed by the United States, Russia, and the United Kingdom, whose guarantees did not fully prove themselves.

Obviously, the Member States agree in theory, „to do things together, spend together, invest together, buy together, act together", as Federica Mogherini summed up the *raison d'etre* of PESCO, and they started 17 EU defence projects in 2017[25] but only very few of them progressed substantially. If ones takes a closer look at those few projects which have some

[25] Flynn (footnote 19), p. 80-81.

meaningful support among the member states, it will be apparent that these are not the militarily most significant projects but rather logistic and support staff issues.

So, for example, there are many participants in the Military Mobility project, but almost none in the Artillery or the Light Armoured Vehicle projects, which have par excellence military capabilities. Also very telling is the story of the Eurofighter, a genuine transnational European defence capability project: the Eurofighter Typhoon is, according to its manufacturer, "the world's most advanced swing-role combat aircraft providing simultaneously deployable Air-to-Air and Air-to-Surface capabilities",[26] but is in service only in five EU Member States, which at least hints at how hard it is to achieve unanimity among EU Member States in defence matters.

This is sobering but logical, because the sale of arms and the defence industry are of vital economic and political interest as well. The different interests are influenced by the circumstance of being a manufacturer or a buyer of weapons and weapon systems. Hence, a pooling and sharing provokes the question as to whether, and, if yes, to what extent, the national defence industry is or might be influenced by a further military integration.

Does a defence integration aiming to achieve economies of scale require the restructuring of defence industry facilities? If yes, and those facilities are needed to scale down in some Member States, then it is not only economically painful, but results in the loss of vital know-how and capabilities which are of interest to national security. If industry facilities are needed to be kept for economic or political reasons, which seems to be a more viable option, economies of scale might only be achieved if existing facilities produce cross border co-operation, which would require the sharing of military secrets, and this again raises our attention to the question as to whether there is such a mutual trust among the Member States.

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[26] <https://www.eurofighter.com/>.

Mr. Macron demanded in his Sorbonne address a much more beefed up form of defence cooperation, a "common intervention force, a common defence budget, and a common doctrine for action". This points to a further possible tension in defence co-operation, which I would call the Clausewitz challenge. As Clausewitz put it in his famous treatise "On War", armed conflicts never stand alone, have no purpose in themselves, because they are always fought to achieve some political aim, which of course is also the case for defence co-operations as they are called into life because of the eventuality of an armed conflict. France for example quite often intervenes in Africa, to help her former colonies out, so it is understandable that she is keen on having a common intervention force which would enable the sharing of the cost of these operations. Other Member States, however, do not necessarily share this political aim, for example Central and Eastern European countries having had no colonies at all see no reason to shed the blood of their countrymen in *Africa francaise*. This tension would be similar to The Migration Crisis, as Central and Eastern European countries and their leaders did not volunteer for the reallocation of asylum seekers and migrants not only because of cheap nationalism, but also because they felt that taking care of former colonies is none of their business at all, as they have had none of them and did not profit from them. This only highlights that defence and military co-operation do require common political aims.

A further question of a political but also of a constitutional nature is the question of command. Deploying armed forces is a most intricate question, mirroring the constitutional culture of a political entity. The French President, as the Commander-in-Chief of the Armed Forces according to Art 15 of the French Constitution has wide-ranging powers regarding the armed forces, the German Armed Forces may basically be deployed only by virtue of a parliamentary decision. The United Kingdom have leant basically towards the French solution, and until very recent times, the Prime Minister could have essentially decided without the approval of the Parliament to deploy British armed forces (this has changed somewhat during the last two decades). There is no space to fully develop a com-

parative reasoning, but it is necessary to point out that there are very different rules for deploying armed forces which have to be respected in a future NATO-EU framework.

V. The B-Word

Brexit is one of the big question marks in the NATO-EU alliance for many reasons. Even if the United Kingdom leaves the EU, but does not leave the NATO, it will be involved in any EU-NATO relation on the one side of the table or the other.

Moreover, the UK has key capabilities in many areas, and hence an eventual Brexit means a serious gap in military capabilities, especially the nuclear deterrent and aircraft carriers. The UK has a policy of continuous at-sea deterrent, which are based in Scotland, and are a pillar of European defence. The second area where British capabilities will painfully lack are aircraft carriers as the two Queen Elizabeth-class aircraft carriers of UK have no match in Europe. Neither the French nor the Italian navy have air-craft carriers of the same size.

VI. Conclusions

NATO and the EU relations should be built on a stronger and more capable European defence. There are however serious challenges which need to be addressed.

The legal framework of the EU Treaty is by and large viable, nonetheless the neutrality of some Member States might hinder deeper integration.

Much more demanding however are the political challenges. The sharing and pooling of military capabilities offers economies of scale but requires painful choices which can only be made in the case of deep mutual trust.

East meets West - The Idea of European Integration and Security

PRZEMYSŁAW SAGANEK

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I. Introductory Remarks

The 2014 annexation of Crimea by Russia and the ongoing conflict in Eastern Ukraine make the discussion on security in Europe a pressing question. This discussion is all but easy. The choice of the perspective or even of a paradigm seems to have great influence on the arguments presented and conclusions suggested by the participants of this discussion. That is why it seems reasonable to reveal the perspective of the present author. It is namely the perspective of a lawyer and not of a specialist on military matters. Secondly, it is the perspective of a person who spent quite a lot of time dealing with the legal aspects of the European integration. Thirdly it is the perspective of a national of Poland – in all possible respects (e.g. as the first victim of The Second World War, the former socialist state, the "new" NATO and as an EU member, the neighbour of Russia and a country governed at present by a government hated by the European elites). Last

but not least it is the perspective of a person interested in public matters and seemingly having some thoughts on the ideas which may or should have influence on the Polish politicians and statesmen.

It is mainly the Polish point of view that is meant under the cover of "East" which was used in the title of the present text. On the other hand, what is meant by "West" will refer mainly to three capitals, that is to Paris, Brussels, and Berlin. Two remarks must be made. Firstly, the sequence is not a coincidence. Secondly, Brussels is listed here not as the capital of the Kingdom of Belgium and not even in the character of the NATO Headquarters. It is its status as the seat of the most important EU institutions that is of importance here.

Regarding the sequence there can be no doubt that France and its young President, Mr. Macron, seem to be the most active, important or at least visible actors in the field of the European security identity. On 6 November 2018 Mr. Macron called for a "real European army" to "allow the bloc to defend itself against Russia and even the United States, a hugely sensitive idea amongst EU nations which jealously guard their defence."[1] Also Mr. Juncker was reported to say that deference to NATO can no longer be used as a convenient alibi to argue against greater European efforts.[2] The picture would be completely false however if we forget that the statements of Mr. Macron and Mr. Juncker are just responses to a set of utterances of the US President Mr. Donald Trump concerning both NATO and the defence expenditures of its European members.[3]

There is no doubt that NATO and the EU are at the centre of the discussion. One also gets the impression that the two are being presented as alternatives or as rivals. The aim of the present text is to show that such positioning is wrong.

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[1] <https://www.euractiv.com/section/defence-and-security/news/macron-calls-for-european-army-to-defend-against-russia-us-china/>.

[2] <https://www.independent.co.uk/news/world/europe/emmanuel-macron-european-army-france-russia-us-military-defence-eu-a8619721.html>.

[3] See infra.

II. The Problem of Security and of Lawyers

One should start with the remark that security is an element which can hardly be grasped by lawyers. They feel awkward when trying to approach it. The reason seems to be that lawyers are trained to give "yes" or "no" answers. This hardly works in the field of economics, almost never works in the world of diplomacy, and it does not work at all in the field of security. In this respect one remains in the field of probabilities.

The most important message for lawyers is in my opinion that 'security cannot be decreed'. What I mean by this is that a strong and aggressive State is not in a position to effectively convince its weak neighbour that the latter is secure. Coming back to the past it would be difficult to say that 1930s Germany was in a position to convince Luxemburg or Czechoslovakia that they were safe. No unilateral promise or treaty provision would change this fact (however unpleasant it may it be for the self-confidence of lawyers). The problem is that if this weak neighbour is really afraid it has no interest in showing it. It would have even worsened its situation. So in this respect we have to do with a phenomenon of falsification of the picture. It is a paradox that in the contemporary matrix of words of the 'media democracy' this falsification is even bigger. If asked everyday about its security, a representative of a weaker state can only falsify this picture day after day or worsen its position day after day (however unpleasant this may be for the self-confidence of the mainstream media and their admirers).

It is certainly a given that a State may try to improve its security. Two means to this end are feasible. Firstly, a State may improve its own military capabilities. Secondly, it can conclude alliances. All the same there is no guarantee of surviving the next conflict. In this sense a strong state, namely France, was not able to win in confrontation with Germany in 1940. On the other hand, a weak state, namely Sweden, was able to survive the second WW without material, personal or territorial losses. The true reason had to do with the fact that Sweden was not on the list of Germany's targets. The same is true about Portugal. In this respect the

location of a State on a map as well as its policy may be of the utmost importance. However, the only certain factor is that there are no certain factors. In this sense Mexico being a neighbour of the USA may fear a military confrontation with the latter much less than Iran which is situated thousands of kilometres from the American continent.

Another element is the state of mind. Actually, Poland borders the Kaliningrad area, sometimes called the most armed region of the world.[4] Objectively, Poles should be afraid 24 hours per day. However, it is not so. It may be difficult to explain this phenomenon. One can argue that some level of insecurity is to some extent the fate of any state bordering or even not bordering but having some disputes with a state having atom weapons. The idea of security in the atom era is incomparable with the one from the time preceding it. The feeling of security or insecurity among the people in Poland rather has to do with the actual activities of Russia than with its actual size and military potential. The latter are known to everybody. It is another paradox that Russia likes warning other states by informing them of the targeting of missiles on their capitals.[5] However how can anybody think seriously about discussing any precise price for not targeting them if retargeting can take place within a very short time?

This lack of actual frightening of the people can only help statesmen to make decisions which consider security in less psychological and more in geopolitical contexts.

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[4] On Kaliningrad exclave see e.g.: <https://warsawinstitute.org/russia-deploys-tanks-kaliningrad-exclave/; https://nationalinterest.org/blog/the-buzz/natos-worst-nightmare-russias-kaliningrad-armed-the-teeth-25958, https://www.theguardian.com/world/2016/oct/08/russia-confirms-deployment-of-nuclear-capable-missiles-to-kaliningrad.>

[5] <https://www.reuters.com/article/us-usa-nuclear-russia/after-putins-warning-russian-tv-lists-nuclear-targets-in-u-s-idUSKCN1QE1DM>.

III. The Polish Experience with Respect to European Integration

Poland found its place in great politics in the 10th century, upon the acceptance of Christianity. After the very intensive period of power and fame at the edge of the 10th and the 11th centuries, its role became smaller – extending from a complete collapse of the state in the 1030s to its reunification (1940s) and a temporary re-emergence of the Polish king in the 1070s. In 1138 Poland was divided into several smaller organisms with different rulers. The reunification took place at the beginning of the 14th century. At the end of the 14th century the union with Lithuania was established – at the beginning it was just personal and in 1569 it became a real one (creation of a Polish-Lithuanian State) which survived till 1795. The union meant the establishment of a state which was huge and which was based on principles similar to the contemporary democracies (though limited to noblemen only). It showed its ability to counteract its neighbours and domestic crises for more than 200 years. In the 18th century however Poland found itself completely dependent upon Russia. The attempts to get rid of this dependence resulted in three partitions. The last of them (1975) meant that the entire territory of the Polish-Lithuanian state became part of Russia, Prussia and Austria.

It was only in 1918 that the independent Poland reappeared on the map. In 1939 it was attacked by Germany and the Soviet Union and apparently removed from the map. After the 2nd World War Poland reappeared on it and became a member of the UN but its dependence upon the Soviet Union was a cruel and long-lasting fact.

In this sense the year 1989 could be looked at as a kind of miracle.

There can be no doubt that had it been Mr Putin and not Mr Gorbatshov who replaced Mr Czernenko as the leader of the Soviet Union, this miracle would have not taken place or maybe would have taken place but in such a shape which does not deserve the name of miracle.

After some period in which Poland was mainly preoccupied by its internal affairs, the most important decisions dealing with the future of international policy had to be made. Two such directions were chosen. They were namely the EU (then the European Communities) and NATO.

What is more, security aspects were present behind both decisions. As regards NATO they are obvious and require no special comment. What may be less clear are security elements connected with the decision to join the EU. However cruel it may sound for Mr Macron, those considerations would have been more or less the same had the EU not had provisions dealing with the security matters. The truth is that the European economic integration created so many visible and invisible ties among the Member States that a war among them is hardly possible. What is more, an attack on one of them seems to complicate the life of the others. It can be a deterrent factor for possible aggressors who would like to keep good relations with such powerful players as Germany, France, Italy or Spain. This argument is often used by persons who support a quick entry of Poland to the Eurozone.

In fact the people who supported the Polish entry to the EU could be divided into three groups. I could suggest the names: materialists, realists, and idealists. The main preoccupation of materialists were the European funds. In my opinion, important as they are, they are just one element of the entire picture. The idealists seemed to believe in a fundamental change of the entire state (or maybe even society). In fact, they believed that the Polish civil servants will be like Germans (of course not from the period 1933-1945) or Dutch ones. On the other hand, realists looked at the process of integration from the point of view of geopolitics. They were afraid of remaining in a grey area between the EU and Russia. In fact, the fate of Ukraine, Georgia and Moldova seems to confirm how reasonable that type of thinking was.

One should stress that a high price was paid by those states. In my opinion the economies of the Central and Eastern European states needed bigger protection from the richest Western European economies. In fact,

the collapse of communism meant the collapse of the hitherto trade patterns and the collapse of entire branches of the economy. From the present perspective one can say that those states (and Poland in particular) needed a longer adaptation period which would allow them to create new branches of economy and new relatively strong enterprises. In fact, there is neither a Polish Mercedes nor a Polish Nokia.

The adaptation period seems to be necessary because of legal reasons as well. In my opinion the former socialist states needed more time to work out not only the "paper" norms but also the kitchen of democracy. What was necessary was the time for all major political parties to get experience with working under the constitutional norms. In my opinion, the present situation in Poland has to do with the fact that it was only in 2015 (that is more than 10 years after the accession to the EU and 18 years after the adoption of the constitution) that a right-wing party got a real chance to govern the state under the present constitutional norms. It is all the more dramatic as the constitution was adopted by former communists and liberals; the right-wing parties calling for its denial in the popular referendum. What is more, the Polish very influential mainstream[6] seems to deny the right-wing parties the 'moral' right to rule.

All the same we do not know the actual alternative that is the price of postponing the entry into the EU. If the alternative would have been a Russian veto for entry into the EU, the price seems to be worth paying. The same is true if the alternative would have been a decision of the EU to build a fortress and accept no new members for 25-50 years.

The references to the EU as a security area is right to a very high degree. All the same one should recall that when discussing security matters we are within the realm of probabilities. One can imagine the aggressor state which not only attacks one of the EU members, but also warns the others that all which criticize it will be deprived of gas supplies. It is a kind of

[6] In fact one daily, two weeklies and one TV station as well as a big group of highly educated persons and a small but loud group of completely uneducated celebrities.

paradox that an ambitious EU environmental policy may turn out to be an element lowering rather than increasing the strength of the EU and the ability of its Members to cope with a potential aggressor state.

That is why NATO was present in the picture of the Polish aspirations from the early 1990s. The resistance of Russia to this movement was great but it could only show that the direction adopted by Poland was right. At no moment was NATO membership looked as an obstacle to EU membership. In fact, it was possible for Poland to access NATO five years before the entry to the EU. Looking at the situation of the former Soviet states one can easily see that some states may find it easier to enter the EU than NATO. Both are treated as a choice of "Western" political culture as opposed to the Soviet or Russian.

IV. The Polish Experience with Respect to Security

It is important that neither Poland nor the other States of Central and Eastern Europe looked at NATO and the EU as the alternatives. There were no special reasons to look at them in this way. 22 EU members are Members of NATO. NATO helped the European democracies to keep their security during The Cold War.

One can see some paradoxes in this respect, as in many other fields. We can argue that NATO proved its strength and usefulness at the time of The Cold War when the Soviet Union was a strong, dangerous and aggressive player. Nowadays the strength of NATO should be bigger as there is no such an enemy. On the other hand, some would say that NATO is not as necessary as there is no longer the USSR. All the same it would be difficult to say that the level of security of the USA, France, Portugal, Poland and Lithuania is the same. From the perspective of Poland and Lithuania NATO is as important as it was for the Federal Republic of Germany 35 years ago.

The second paradox has to do with the pressure of President Trump on the European states to increase their military expenditure. If the Euro-

pean allies get angry with President Trump, start to build the strategic autonomy and increase the expenditure, then this is what President Trump wants of them. If they do what he wants, the risk of weakening NATO may be overcome.

Of course, this is only a part of the picture. Some utterances of President Trump to NATO are worrying for its members. They include the ones putting into doubt the reliability of the alliance[7] or the American role in it.[8]

In fact, there are many elements in the Transatlantic exchange of views which look like political or even PR tricks. Especially the relationships between Mr. Trump and Mr. Macron give this air of a competition of strongmen, culminating in their famous handshakes. It is not the business of Poland to make positions and comments on each and every such "event"; they are just the most important of unimportant events. Poland and many other states of the region have more important challenges and real problems. That is why we are interested in the preservation of NATO as well as the preservation of the EU.

Of course, if one day the US will decide to come back to isolation we will be able to do nothing about this. There is no doubt that it would be a very bad scenario for this part of Europe. It is no wonder that States such as Poland do not want this scenario and will do nothing to weaken NATO or to accelerate its dissolution and the withdrawal of the US. On the contrary, Poland is ready to invest a lot in NATO and the American presence in this part of Europe.

This is in no case any action against the EU. The simple fact is that NATO means 22 EU members (including the UK), the USA, Canada and 5 non-EU European states (counting Turkey as a European state). It is objec-

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[7] Taylor, "Fort Trump" Or Bust? Poland and The Future Of European Defence, Report, Friends of Europe, December 2018, p. 16.

[8] Muti, Poland, The Missing Link in European Defence, <https://www.iai.it/en/pubblicazioni/poland-missing-link-european-defence>.; Terlikowski, PeSCo: The Polish Perspective/ October 2018, ARES, p. 3, <https://www.iris-france.org/wp-content/uploads/2018/10/Ares-32.pdf>.

tively stronger than any force of the EU as such. The presence of the world superpower makes it highly risky to attack one of the members of NATO (once again recalling that we can talk only about probabilities and not confirmed and certain facts). In this respect the combination of NATO and the EU is the best choice for the states of the Central and Eastern Europe. Any other scenario would be against our interests and we will do everything to avoid it or at least postpone it as much as possible.

V. The EU Treaty Framework on Security Matters

It must be stressed that Poland as any EU member is bound by the treaty provisions on security matters. A few words must be said about their development.

The 1954 collapse of the European Defence Community (EDC) Treaty and the 1957 signature of two Rome Treaties meant that the question of security found itself outside the scope of the founding treaties. The return of them to security matters required about 30 years.

It was connected with the entry into force of the Single European Act (SEA). What is of importance here is the establishment of the European Political Cooperation. It was regulated by Title III of the SEA (comprising one article only, namely art. 30). A separate set of provisions devoted to security found their place in art. 30 para. 6. According to it:

(a) The High Contracting Parties consider that closer co-operation on questions of European security would contribute in an essential way to the development of a European identity in external policy matters. They are ready to co-ordinate their positions more closely on the political and economic aspects of security.

(b) The High Contracting Parties are determined to maintain the technological and industrial conditions necessary for their security. They shall work to that end both at national level and where appropriate within the framework of the competent institutions and bodies.

(c) Nothing in this Title shall impede closer co-operation in the field of security between certain of the High Contracting Parties within the framework of the Western European Union or the Atlantic Alliance.'

It is visible that only 'closer cooperation' was provided for. All the same Member States were cautious enough to insert a separate safety clause – concerning both the WEU and NATO.

The TEU in its original 1992 version (The Maatricht Treaty) was the second step in this respect. The Common Foreign and Security Policy became for the next 16 years a so-called Second Pillar of the newly created EU. The provision of special importance for security and military matters was then art. J 4.

Its para. 1 made it clear that 'The common foreign and security policy shall include all questions related to the security of the Union, including the eventual framing of a common defence policy, which might in time lead to a common defence." This provision turned out to be a permanent solution, present in the EU law until now, though in a modified version.

What turned out to be much less permanent was the exclusion of the decision-making mechanism typical for the entire 2nd pillar.[9]

Another element typical for the Maastricht treaty in its original version was a reference to the Western European Union. Art. J 4 (2) provided that "The Union requests the Western European Union (WEU), which is an integral part of the development of the Union, to elaborate and implement decisions and actions of the Union which have defence implications. The Council shall, in agreement with the institutions of the WEU, adopt the necessary practical arrangements."

It was quite a bizarre provision as only certain members of the EU were also members of the WEU. In this sense this part of The Maastricht Treaty was the first treaty solution on enhanced cooperation. What is more, art. J 4 (5) provided that 'The provisions of this Article shall not prevent the

[9] According to art. J 4 (3), 'Issues having defence implications dealt with under this Article shall not be subject to the procedures set out in Article J. 3.'

development of closer cooperation between two or more Member States on a bilateral level, in the framework of the WEU and the Atlantic Alliance, provided such cooperation does not run counter to or impede that provided for in this Title.'

Last but not least a safeguard clause was addressed to the NATO membership. According to article J 4 (4) "The policy of the Union in accordance with this Article shall not prejudice the specific character of the security and defence policy of certain Member States and shall respect the obligations of certain Member States under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework.'

This safeguard (in slightly modified version) could be found in art. 17 (1) of the TEU in the versions resulting from The Amsterdam and Nice Treaty and now forms art. 42 (7) second para.

The Treaty of Amsterdam shifted the complex regulation of security and military matters to article J 7 of the TEU, which was at the same time renumbered as art. 17 of the TEU.

Its para. 1 (1) repeated that 'the common foreign and security policy shall include all questions relating to the security of the Union'. It was more precise as regards the possible introduction of the 'common defence'. Its adoption was dependent upon the decision of the European Council accepted later by the Member States in accordance with their respective constitutional requirements.[10]

Unlike its predecessor, the Treaty of Amsterdam made it possible for the EU organs to adopt all measures of the 2nd pillar in matters of security.

The most characteristic (though possibly not the most important) element was a reference to the EU missions. Art. 17 (2) of the TEU provided

[10] Identical solution is adopted by art. 42 (2) TEU in the current version.

that: 'Questions referred to in this Article shall include humanitarian and rescue tasks, peace keeping tasks and tasks of combat forces in crisis management, including peace making.'

An element of great importance was a complex regulation of the relationship between the EU and the WEU. There is no room for a detailed discussion of the matter, as it is a part of history at present. It must be stressed, however, that the WEU was seen rather as a tool in the hands of the EU.

In fact, the Treaty of Nice eliminated all references to the WEU. Other provisions of art. 17 were left intact.

The TEU in the present (that is after-Lisbon) version contains a complex set of rules on security. There is no room to present all of them.

According to art. 42 (1) TEU 'The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States.'

Despite the similarities one can see more decisive and ambitious language. It can be seen in art. 42 (3) TEU which reads that 'Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council. Those Member States which together establish multinational forces may also make them available to the common security and defence policy.'

The same provision obliges the Member States to progressively improve their military capabilities and defines the tasks of the European Defence Agency.[11]

[11] It shall identify operational requirements, shall promote measures to satisfy those requirements, shall contribute to identifying and, where appropriate, implementing any measure

Art. 42 (7) TEU contains a relatively weak casus foederis, according to it 'If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.' However it reserves the primacy of NATO commitments (of course for NATO Members).[12]

One should also cite art. 46 TEU which is the legal basis of permanent structured cooperation (PESCO).[13]

VI. The Attitude of Poland to the EU Treaty Provisions and Their Implementation

There is no doubt that the present shape of the treaty provisions on security is the result of evolution. A modest beginning and the progressive direction ('always more, never less') are quite typical for the philosophy of European integration. What is atypical is a rather slow speed of reforms. This is due to many elements. Just to name one we can refer to the close link of security not only to state sovereignty (whatever it means in Europe in the 21st century) but also to the very preservation of statehood.

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needed to strengthen the industrial and technological base of the defence sector, shall participate in defining a European capabilities and armaments policy, and shall assist the Council in evaluating the improvement of military capabilities." See also art. 45 TEU.

[12] 'Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.'

[13] 1. Those Member States which wish to participate in the permanent structured cooperation referred to in Article 42(6), which fulfil the criteria and have made the commitments on military capabilities set out in the Protocol on permanent structured cooperation, shall notify their intention to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy.

2. Within three months following the notification referred to in paragraph 1 the Council shall adopt a decision establishing permanent structured cooperation and determining the list of participating Member States. The Council shall act by a qualified majority after consulting the High Representative."

In any case, it is not the intention of Poland to cancel those provisions or to reverse their evolution and to come back to e.g. the SEA version. As it was said several times that NATO is not against the EU, one can reverse this statement and say that the EU is not against NATO. Safeguard clauses to this effect present in the various versions of the treaties were already mentioned. There is no doubt that the strength of the European NATO Members means the strength of NATO. If this strength can increase due to the EU instruments, EU-NATO Member States can only be satisfied. As M. Terlikowski puts it 'Ever since its accession to the EU, the CSDP has been considered an additional security mechanism for Poland, complementing the national defence capacity, membership in NATO and strategic partnership with the U.S.'[14] Poland is also aware that the building of the European capabilities may be useful for some unpredicted and unwelcome future developments regarding NATO. All the same the former should not be seen as an invitation or catalyst of the latter.

It must be said however that the opinions on Poland's attitude refer to a lack of trust, lack of interest, or lack of engagement. K.Muti for example writes that "As EU member states step-up efforts to strengthen defence cooperation and integration, Poland's role and contribution remain an enigma."[15] However even the author of a very Euro-enthusiastic report does not leave any doubts that „Russia remains the main security challenge for Poland, and NATO is believed to be the only concrete protection against a possible military threat from this country. NATO is seen as necessary for the security of their country by 91% of Poles, 81% of Hungarians, 75% of Czechs and 56% of Slovaks."[16]

What is a most interesting for some commentators was the Polish attitude to the Permanent Structured Cooperation on security and defence (PESCO). Its establishment is associated on the one hand with the aggres-

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[14] Terlikowski (footnote 8), p. 2.

[15] Muti (footnote 8).

[16] New Pact for Europe, National Report, POLAND, November 2017, Institute of Public Affairs, <newpactforeurope.eu>, p. 13.

sive attitude of Russia and with Brexit on the other.[17] Actually Poland was one of 23 Member States which acceded to PESCO at once.[18] It was not a sponsor of the initiative, however.[19] Interestingly enough, one state of the region (the Czech Republic) was one of the sponsors.[20] According to J.Gotkowska, „Central Europe perceives the whole process sceptically."[21] A. Ciupiński notes that the first reaction of Poland was rather reserved and that it cared not to undermine NATO.[22] As M. Terlikowski puts it: 'Already at the meeting of EU defence ministers in September 2016, when the European Global Strategy (EUGS) implementation agenda was discussed, Poland argued that the EU should avoid duplication of competencies and tasks of the Alliance, particularly in planning and conducting operations.'[23] Another reason for scepticism is a care about smaller enterprises.[24] Two projects in which Poland participated initially referred to mobility and to the European Secure Software Defined Radio (ESSOR)."[25]

What attracted the attention of the specialists of international security are the Polish efforts to increase the American presence on the Polish territory. It took the shape of the 'Fort Trump' initiative. For P. Taylor it means putting too many eggs into one basket.[26] In my opinion however, a much more pertinent analysis is provided by P. Buras and J. Janning. They write about two fatalisms: the German one and the Polish one. They describe the latter by writing that:

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[17] Ciupiński, PESCO jako próba osiągnięcia europejskiej autonomii strategicznej, Kwartalnik Bellona, 1/2018, p. 30.

[18] Ciupiński (footnote 17), p. 32.

[19] Ciupiński, Nowe struktury obrony Europy Zachodniej, Security Review, 4(9)/2018, p. 16.

[20] Ciupiński (footnote 19), p. 16.

[21] Gotkowska, The Trouble with PESCO. The Mirages of European Defence, OSW, Point of View Number 69, Warsaw, February 2018, p. 5.

[22] Ciupiński (footnote 17), p. 34.

[23] Terlikowski (footnote 8), p. 4.

[24] Ciupiński (footnote 17), p. 34, see also Zaborowski, Poland and European Defence Integration. Policy Brief, 25 January 2018.

[25] Ciupiński (footnote 19), p. 17. Terlikowski (footnote 8), p. 2.

[26] Taylor (footnote 7), p. 13.

'Poland's fatalism about America (…) is anchored in the notion that US security guarantees are indispensable in an increasingly dangerous geopolitical environment. Due to the lack of viable alternatives, Poland has no choice but to bet on continuous American security engagement with Central and Eastern Europe. (…) And, if it fails, the outcome will not be more disastrous than that of any other strategy.'[27]

P. Taylor is more accurate when he realizes that 'The experience of having been abandoned by the European powers when Nazi Germany invaded in 1939 underlies Polish scepticism about EU efforts at closer defence integration, and doubts about whether NATO would agree collectively to jump to Warsaw's defence in a timely manner in case of a possibly ambiguous hybrid Russian attack.'[28]

VII. Conclusion

We can say that the future remains a secret. All that we can do is to try to increase our level of security. The EU can help in many respects. It must be understood that it can also make the defence of its flaking Members more difficult. In my opinion the EU cooperation should be welcome. All the same it must be stressed that security is not a banana market and the Community methods typical for the internal market are not to be introduced here. Successful as they are, they must be kept to their proper scope of application. The defence of Gdansk must be first of all a decision for Poland. If a future common army is to help that is good. If Brussels thinks about replacing Poland in such decisions, there is nobody to opt for such a solution.

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[27] Buras /Janning, Divided at the Centre: Germany, Poland, and the Troubles of the Trump Era, December 2018, Konrad Adenauer Stiftung, p. 8.

[28] Taylor (footnote 7), p. 15.

Migration and European Security – with a Special Emphasis on Serbia as a Transit Country

JELENA CERANIC

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I. Introduction

The phenomenon of a massive movement towards Europe of migrants and refugees from the Middle East, particularly from Syria in 2015/16 has been described as the world's worst refugee crisis of our time. This forced

migration wave has been provoked not only by the continuing violations of international humanitarian law within and beyond the region, but also by the deteriorating situation in neighboring countries such as Turkey and Lebanon, where the majority of refugees continue to seek shelter.[1] Therefore, an increasing number of persons have been moving to those European countries perceived as safe countries of asylum.

As regards Middle Eastern refugees moving into Europe, a large number of these persons reached Central and Western Europe by taking the *Western Balkans route*. Travelling along this route meant travelling through certain countries which were not bound by EU asylum legislation – the Republic of North Macedonia and the Republic of Serbia. Their asylum systems were of poor quality. These countries' principal source of obligations towards refugees remains the Geneva Convention relative to the Status of Refugees from 1951 (Refugee Convention). Therefore these countries provide an excellent model for a broader examination of the position of transit countries under International Refugee Law.

Neighboring countries such as Croatia and Bulgaria are no less "transitory" than North Macedonia and Serbia. However, these two countries are EU Member States which implies that they are bound by EU *acquis* and its Dublin system.[2] Being an EU Member State opens up another legal aspect that is not strictly relevant to an analysis of universal legislation.

Policy towards refugees and migrants travelling along the Western Balkans route did evolve through several distinct stages, usually through joint undertakings by major EU receiving countries and the governments

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[1] Kilibarda Pavle, Obligations of transit countries under refugee law: A Western Balkans case study, International Review of the Red Cross, 99/2017, pp. 211-238, p. 212.

[2] The Dublin system refers to a list of criteria established by the EU's Dublin Regulation in order to determine which country is responsible for addressing an individual's asylum claim. The specificity of this system is reflected in fact that the criteria are applied in a subsidiary manner. It means that the Member State in which an asylum-seeker is located may not necessarily be the responsible one for that case.

of the Western Balkan countries themselves. It was so until the Western Balkans route was completely closed in March 2016 after the EU-Turkish Agreement.

A comprehensive analysis of the relations between migrations and European security goes beyond the scope of this paper. Therefore, this article attempts to shed light only on some aspects of the migration crisis, i.e. to explain the position and obligations of transit countries. Accordingly, the presentation of this issue through the prism of Serbian experience could provide an excellent model for a broader examination of the position of transit countries under International Refugee Law. After short introductory notes (Part I.) and clarification of terminology (Part II.), the present paper analyses the so-called Western Balkans route (Part III.). Thereafter, the experience of Serbia as a transit country is examined (Part IV.). Special attention is devoted to the new Law on Asylum and Subsidiary Protection. Finally, in order to define the obligations of transit country under Refugee Convention, the article seeks to determine minimal standards of protection applicable to refugees in a transit context (Part V.).

II. Terminology

With respect to terminology, the phrase *refugees and migrants* is used in the present article. Different stakeholders use different terms to refer to the same phenomenon of forced migrations employing such terms as migrants, vulnerable migrants, forced migrants, asylum-seekers, persons in need of international protection, or even transit migrants. However, referring to refugees and migrants seems to be the most appropriate way of pointing out the legal relevance of status in a mixed-migration flow.

As regards *mixed-migration flow*, the fact is that contemporary irregular migration is mostly mixed. It means that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of traveling and vessels. They cross land and sea borders without authorization, frequently with the help of people smugglers. Mixed flows can include refugees, asylum seekers and others with specific needs, as

well as other irregular migrants. It should be emphasized that groups are not mutually exclusive, as people often have more than one reason for leaving home.

The *safe third country* concept operates on the basis that an applicant for international protection could have obtained it in another country and therefore the receiving State is entitled to reject responsibility for the protection claim. As is the case for the first country of asylum concept, which covers refugees who have already obtained and can again avail themselves of protection in a third country, the safe third country concept is in most cases applied as a ground for declaring an application inadmissible and barring applicants from a full examination of the merits of their claim.[3]

Finally, the concept of a *transit country* refers to a country that refugees and migrants pass through along the way to their preferred country of asylum. Hence, transit country may be located anywhere between the country of origin and the country of destination. But it is important to note that no transit country may be absolutely regarded as such. There will always be a certain number of persons interested in staying there and genuinely seeking some form of protection. So the designation is also subject to change as circumstances change.

Therefore, it seems to be the most suitable to define a transit country as a country in which, in a given moment, a large majority of refugees and migrants otherwise interested in seeking and receiving international protection refrain from doing so, or do so without genuinely intending to stay there; where they do not remain for a significant span of time; and which they eventually attempt to leave in an irregular manner. Western Balkan countries (Serbia and North Macedonia) meet this definition.[4]

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[3] <https://www.ecre.org/wp-content/uploads/2017/11/Policy-Note-08.pdf.>.

[4] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, pp. 215-216.

III. The Western Balkan Routes

The Balkans has been an entry point for refugees and migrants into Central Europe for years. However, from April/May 2015, the number of new arrivals began to increase. In fact the old Mediterranean route was replaced by the Western Balkans route. Travelling from Turkey to Greece and then through the Balkan countries in order to reach Western and Central Europe gradually became a preferable alternative for the dangerous journey across the Mediterranean.

Nevertheless, Western Balkan countries such as Serbia and North Macedonia remained almost exclusively transit States. Actually, the vast majority of refugees and migrants simply passed through them without intending to request asylum from their authorities.

1. Unique way of operation

Although there were many different migrant routes active before 2015, the way the Western Balkans route operated between the summer of 2015 and the spring of 2016 was unique.

The Western Balkans route was special because from September 2015 to March 2016, it was the countries on this route which facilitated the transport of forced migrants towards the most desirable destinations rather than human smugglers. The States involved provided medical care and humanitarian assistance along the route as well as transportation and a number of provisional reception centers to accommodate the max influx of persons in transit.

In the late summer of 2015, Germany decided to accept a large number of Syrian refugees and the European Commission as well as a number of European countries welcomed that decision. Although there was no clear basis for it in EU law, the countries along the Western Balkans route, with the support of human rights activists and international organizations, decided to form a passage and helped refugees transit through their

territory. Most of the refugees did not fill in the asylum applications in these countries as there was a silent agreement they would be 'waved through' to Germany.[5]

This practice persisted for several months after Hungary had closed its borders, and basically involved an open-border policy with respect to refugees and migrants crossing into North Macedonia from Greece. However, restrictions on this manner of free movement were gradually imposed. Finally, after the EU–Turkey Agreement of March 2016,[6] the Western Balkans route was completely "shut down".

As a result of this, the majority of refugees and migrants are no longer able to use this route to travel to those European countries perceived as countries of asylum. However, persons who do reach Serbia may still submit an asylum application there.

When the Western Balkan route was shut down in March 2016, many questions about what would happen to the refugees taking this route remained unanswered. For example, around 7000 refugees remained stranded in Serbia. When the route closed, they did not seek asylum in Serbia, but rather remained there as irregular migrants in the hope that they would find their way to the EU. From their point of view, they were caught at an arbitrarily determined point, when the borders were open and when they closed down again.[7]

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[5] The countries along the Western Balkan route at different points during the refugee crisis concluded that the Dublin III Regulation (which outlines which EU country is responsible for individual asylum claims) and other asylum and refugee-related EU Directives were not fully applicable during the 2015/16 refugee crisis. Some politicians, especially in Croatia, even said outright that they could not follow the EU legislation since it did not envision more than half a million of the refugees coming in such a short period and passing through the territories of these countries. At the peak of the refugee crisis in the autumn of 2015, Croatia did not consistently fingerprint refugees passing through its territory as it was envisioned in the EURODAC Regulation, but helped them get through Croatia towards Slovenia and Austria and then towards Germany.

[6] <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

[7] <https://www.greeneuropeanjournal.eu/the-western-balkan-route-a-new-form-of-forced-migration-governance-in-europe/>.

While the European Commission welcomed such cooperation between EU States in September 2015, in the summer of 2017 the Court of Justice of the European Union (CJEU) effectively ruled that such cooperation was not in line with EU legislation. The two relevant cases are A.S. v. Slovenia[8] and Jafari.[9] The two CJEU judgments can be understood as an effort to strengthen the Common European Asylum System that has been shaken by the refugee crisis. They reinstate the legal boundaries that had become blurred due to massive non-compliance by Member States during the organized secondary movements through the Western Balkans corridor.[10]

2. EU-Turkish Agreement

On 18 March 2016, the European Commission and the Turkish government concluded an agreement with respect to the influx of migrants from Turkey to Greece. The goals of the agreement were to break the business model of the people smugglers and to offer migrants an alternative to putting their lives at risk. The agreement consists of nine Action Points.[11]

The first Action Point states that all new irregular migrants crossing from Turkey to the Greek islands will be returned to Turkey as of 20 March 2016. The transfer of asylum seekers to a third country like Turkey is only permissible if there is an individual determination of claim, legal representation, appeal and the prohibitions of collective expulsion and non-refoulement should be taken into account. The latter is the prohibition to return ("refouler") a refugee to the frontiers of territories where his life or freedom would be threatened. Last but not least, it is questionable whether Turkey can be considered a safe third country.

However, it is stated in the agreement itself that the return of migrants to Turkey will be in full accordance with European and international law. It

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[8] CJEU, Decision of 26 July 2017 in the Case 490/16, A.S. v. Slovenia.

[9] CJEU, Decision of 26 July 2017 in the Case 646/16, Jafari.

[10] <https://eumigrationlawblog.eu/cjeu-rulings-on-the-western-balkan-route-exceptional-times-do-not-necessarily-call-for-exceptional-measures/>.

[11] <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/.>.

is required that there will be no collective expulsions and that the prohibition of non-refoulement will be respected. According to the agreement, migrants arriving on the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive and in cooperation with UNHCR. Consequently, according to the text of the first Action Point, the application of the agreement will be in accordance with the Refugee Convention and European Asylum Law.[12]

The Agreement stipulates that for every Syrian being returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to an EU Member State. This provision, however, has been a subject of intense debate. It could be said that it was at odds with the prohibition of non-discrimination based on country of origin laid down in article 3 of Geneva Convention. The 'one in-one out' resettlement approach is clearly a complicated and worrying suggestion and one that is incompatible with EU law.[13]

"The idea that one Syrian can be substituted for another is deeply inimical to established European traditions and norms in human rights, in which the individual circumstances of each person is the key factor. Moreover, a plan under which it is possible to penalise one Syrian for seeking to get to the EU and at the same time to privilege another who has not tried to do so is fundamentally incompatible with the human rights foundations of European integration."[14]

3. European solidarity on the test

This unforeseen mass influx situation put European solidarity to the test, both amongst receiving and transit countries, as well as towards refugees

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[12] Rodrigues Peter, Migration and Security in times of the refugee crisis – Perspectives for Dublin and Schengen, in: Kellerhals/Baumgartner (eds.), New dynamics in the European integration process – Europe post Brexit, Zürich 2017, pp. 183-202, p. 188.

[13] <https://www.ceps.eu/ceps-publications/eu-turkey-plan-handling-refugees-fraught-legal-and-procedural-challenges/>.

[14] Ibid.

themselves. Although the necessity of forming a common European response was recognized early on during the crises of 2015, a comprehensive common policy was not implemented.[15] The response to the crisis has been characterized by an imbalance between solidarity and security. When faced with an unprecedented influx of people in 2015-16, the pendulum swung sharply towards the latter, with the EU and its members concentrating predominantly on (mostly) *ad hoc* temporary solutions rather than systematic structural reforms.[16]

The lack of intra-EU solidarity has been a major source of tension between EU countries, not only casting doubts over the future of Schengen, but having a wider negative impact on cohesion within the Union. (…) "sharing the burden of refugee management is a litmus test for European solidarity." [17]

EU governments have struggled to respond effectively to the crisis and still find it difficult to forge compromises because of deep differences of opinion between and within countries. It remains very difficult to reconcile the two basic camps: those who argue that Europeans have a moral, humanitarian and legal obligation to support those in need of help and refuge (so-called 'solidarity' camp) and those who argue that Europe must protect itself from the large numbers of people trying to reach the continent (so-called 'security' camp).[18]

Closing the Western Balkans route and the 2016 EU-Turkey deal have partially sealed Europe's borders. Further steps towards a 'fortress Europe' would seriously undermine basic human rights and the Union's international asylum obligations.[19]

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[15] <https://blogs.icrc.org/law-and-policy/2016/06/23/european-migrant-crisis-avoiding-another-wave-refugees-living-limbo/>.

[16] <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941&>.

[17] Ibid.

[18] Ibid.

[19] Ibid.

IV. The Republic of Serbia as a Transit Country

The Republic of Serbia has come into the international spotlight during the refugee crisis. It has been praised by the international media and stakeholders as a model of good and tolerant policies towards refugees and migrants. The Serbian authorities and citizens, as well, met the wave of refugees and migrants from the Middle East and North Africa with tolerance and hospitality. More than one million migrants have been registered in the territory of Serbia since the onset of the crisis. The country provided the necessary medical care and accommodation for all migrants. Serbian approach has become even more visible and positive in comparison to the attitude adopted by some EU countries which openly expressed hostility towards the increasing number of migrants.

The Republic of Serbia is continuously working to improve and strengthen the system of migration management and the asylum system, both in a normative and operational sense. However, Serbia has still not been considered a safe third country.

1. Serbia's asylum system

While the treatment of refugees and migrants in transit by authorities in Serbia was absolutely positive, Serbia remained a "transit country". Serbia has never been perceived by refugees and migrants as a safe country of asylum. Serbia's asylum system has been described as poor and incapable of providing effective protection. In support of this claim is also a fact that only few refugees and migrants decided to apply for asylum in Serbia. The rest of them accepted a provisional shelter that the authorities provided before making their way towards those European countries that could provide them with a long-term protection.

The context in which Serbia's asylum system functions is influenced by its legal background as former federal units of the Socialist Federal Republic of Yugoslavia. The Socialist Federal Republic of Yugoslavia had been one of the original States party to the 1951 Refugee Convention and being non-

aligned, a major receiving country for refugees from the Eastern Bloc.[20] Post-World War II Yugoslavia guaranteed the right to asylum already in its 1946 Constitution.[21] (...) After breakup of the country, its federal units began to develop their own asylum system.

With respect to Serbia, in 2008 a general Law on Asylum entered into force.[22] During the migration crises, many weaknesses of this law appeared. Taking into consideration these deficiencies on one hand, and the EU integration process on the other hand, the Republic of Serbia adopted a new Law on Asylum and Temporary Protection in 2018.[23]

Unlike most European asylum legislation, Serbia's system envisions a procedural difference between "expressing the intention to seek asylum" or "seeking asylum" and formally "submitting an application for asylum". Speaking *de jure*, only persons who have done the latter are actually considered as having entered the asylum procedure.[24] And this may have practical consequences for the position of asylum seekers (see below, V.1.c.).

2. The new Law on Asylum and Temporary Protection

The Serbian new Law on Asylum and Temporary Protection was adopted on 22 March 2018. This act brings about wide-ranging modifications to the Serbian asylum system as part of EU accession negotiations commitments, mirroring the structure and procedures laid down in the EU asylum *acquis*.

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[20] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, pp. 215-216.

[21] Constitution of the Federal People's Republic of Yugoslavia, Official Gazette of the FPRY, 31 January 1946, Art. 31.

[22] Law on Asylum, Official Gazette of the Republic of Serbia, 109/2007,

[23] Law on Asylum and Permanent Protection. Official Gazette of the Republic of Serbia, 24/2018.

[24] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, p. 217.

The Asylum Office is now required to decide on asylum applications within 3 months, as opposed to 2 months prior to the adoption of the Law on Asylum and Temporary Protection. The 3-month deadline may be extended by a further 3 months in complex cases or at times of a large number of applications, while the Office may postpone the examination of the application in case of an uncertain situation in the country of origin. In any event, the processing of asylum applications can never exceed 12 months, in contrast with 21 months under the recast Asylum Procedures Directive.[25] The new Law on Asylum and Temporary Protection further introduces a set of special procedures including the accelerated procedure, the border procedure, and formal inadmissibility grounds.[26]

In accordance with this Law, an asylum seeker may be subject to different restrictions on freedom of movement, or even detention, under the same set of grounds. The Law sets out "grounds for limiting movement" which correspond to the grounds for detention laid down in the recast Reception Conditions Directive:[27] (a) verification of identity or nationality; (b) determination of the main elements of the claim which cannot be done without such a restriction, in particular where there is a risk of absconding; (c) application made for the sole purpose to avoid deportation; (d) protection of national security or public order; and (e) decision, in a procedure, on the applicant's right to enter the territory.

According to the new legislation, the risk of absconding is assessed taking into account *inter alia* previous attempts of the applicant to irregularly leave Serbia, refusal to establish his or her identity and provision of false information on identity or nationality.

However, the list of measures to restrict freedom of movement raises concerns. The prohibition on leaving the Asylum Centre, regular reporting to the police, assigned residence in the Asylum Centre under strict

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[25] Directive 2013/32/EU on common procedures for granting and withdrawing international protection, OJ L 180, 29. Jun 2013

[26] <https://www.ecre.org/serbia-new-act-on-asylum-and-temporary-protection-adopted/>.

[27] Directive 2013/33/EU laying down standards for the reception of applicants for international protection, OJ L 180, 29. Jun 2013.

police supervision, assigned residence in a social protection institution for children under strict control, temporary confiscation of travel documents and detention in the Shelter for Foreigners that may be ordered if the asylum seeker does not comply with a prohibition on leaving the Asylum Centre or regular reporting obligations. The prohibition on leaving the reception center amounts to deprivation of liberty regardless of its designation in the this Law, in line with European Court of Human Rights case law.[28]

Restrictions on freedom of movement cannot exceed 3 months, subject to the possibility of a prolongation for another 3 months in the case of restrictions related to the determination of main elements of the claim or the protection of national security or public order. The asylum seeker can appeal the order of restriction on freedom of movement within 8 days.[29]

Despite the fact that this new law has brought many improvements, practitioners working with refugees and asylum-seekers in Serbia during past years argue that the position of Serbia as a transit country for refugees and migrants cannot be expected to change overnight.

3. Serbia – "safe third country"?

As it was explained above, the notion of *safe third country* refers to a procedural limitation on examining an individual's asylum claim, introduced by certain countries, based on the fact that the individual entered the receiving country after having passed through one or more safe countries where they had the possibility of seeking and receiving effective international protection.

The United Nation High Committee for Refugees (UNHCR) has strongly advised against considering Serbia as safe third country and returning asylum- seekers there. Also, the European Court of Human Rights in its ruling against Hungary agreed with these considerations.

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[28] <https://www.ecre.org/serbia-new-act-on-asylum-and-temporary-protection-adopted/>.

[29] Ibid.

In its decision *Ilias and Ahmed v. Hungary*[30] from March 2017, the European Court of Human Rights found that Hungary violated several provisions of the European Convention on Human Rights by returning two asylum seekers from Bangladesh (after carrying out the accelerated asylum procedure in Röszke detention unit) back to Serbia in 2015. The Court found that the asylum seekers were unlawfully deprived of their liberty and that the conditions in which they were staying in the detention unit were inhumane and degrading. Hungary therefore had violated the Articles 5 and 3 of the European Convention on Human Rights. In addition, since Hungary officially considers that Serbia is a safe third country, the refugees were returned to Serbia informally (without cooperation with Serbian police) following the asylum procedure.

The Court found that the Hungarian authorities did not implement the procedure for returns in accordance with the EU Return Directive[31] and that the refugees did not have any effective remedy at their disposal that could challenge the decision to return them to Serbia, which is a violation of Article 13 of the European Convention on Human Rights (ECHR). The Court pointed out that the return of refugees to Serbia, the country which the UNHCR declared unsafe in 2012, creates the risk of further return to Macedonia and Greece (chain *refoulement*) and exposure to treatment contrary to Article 3 of ECHR. According to Article 3 ECHR no one shall be subject to torture or to inhuman or degrading treatment or punishment. The Court noted that not only had the Hungarian authorities not considered whether there is an individual risk of inhuman and degrading treatment in the case of returning refugees to Serbia, but they even refused to take into account the reports submitted to them, basing the decision solely on the Regulation of the Government of Hungary from 2015, which declares Serbia a safe third country.[32]

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[30] ECHR, Decision of 14 March 2017 in the Case 47287/15, Ilias and Ahmed/Hungary.

[31] Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

[32] Kilibarda Pavel, Developments in International Judicial and Quasi-judicial practice relevant to the Serbian Asylum System: a Legal Review, Pravni zapisi, 2/2017, pp. 352-358, p. 355.

V. Application of Refugee Convention in Transit Countries

Since the Republic of Serbia is not an EU Member States yet, it's not bound by its asylum legislation. Therefore its principal source of obligations in this field remains The Geneva Convention. The present article seeks to determine the scope of obligations of Serbia regarding the treatment of refugees and migrants in transition context, and more broadly, the obligations of other countries in similar situations.

1. Regimes of refugee protection, asylum and subsidiary protection

Although the terms *refugee status* and *asylum* may commonly be heard in the same context, they are not identical. Each has its own meaning and history in international law. So, understanding the difference is crucial to establishing the obligations of transit countries. In this context, the notion of *subsidiary protection* is also important to be explained.

a. Refugee status

With respect to the international system of refugee protection, the main point of reference is the 1951 Refugee Convention. This Convention establishes an objective regime of refugee protection which is independent of the will of the receiving State Party – once persons meet the requirements for refugee status, they are to benefit from its protection, regardless of whether they have been granted asylum by any country.

In accordance with the Geneva Convention:

"For the purposes of the present Convention, the term "refugee" shall apply to any person who (...) as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it." [33]

The Convention entered into force on 22 April 1954, and it has been subject to only one amendment in the form of a 1967 Protocol which removed the geographic and temporal limits of the 1951 Convention. The 1951 Convention, as a post-Second World War instrument, was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe. The 1967 Protocol removed these limitations and thus gave the Convention universal coverage. It has since been supplemented by refugee and subsidiary protection regimes in several regions, as well as via the progressive development of international human rights law.

As a rights-based instrument, the Convention is underwritten by three main fundamental principles: non-discrimination, non-penalization, and *non–refoulement* (non-expulsion).

The most important element is the principle of non-refoulement expressed in article 33 of the Geneva Convention. It provides that:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [34]

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." [35]

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[33] Art. 1, para 2 of the Geneva Convention.

[34] Art. 33, para 1 of the Geneva Convention.

[35] Art. 33, para 2 of the Geneva Convention.

It is often forgotten that the principle of non-refoulment is not unconditional. On the other hand its importance is crucial. It gives minimum protection to a refugee. What is more, this is the only provision that has a chance of being defended as a part of customary law. In the other words, it is binding for states independently of their being or not being parties to the Geneva Convention.[36]

The parties to it are under the entire set of obligations. They could be divided into two groups. One of them refers to the national principle. It means the obligation to grant a refugee the rights equal to the ones of a national (a citizen). The second group is connected with the most favorable treatment. In fact it is less favorable than the national one. It means a treatment equal to the treatment of foreigners being in the best position with the respect to given rights.[37]

However, in reality, a receiving country cannot usually be expected to discern of its own accord whether or not a foreigner entering or already present on its territory is, in fact, a refugee. Under regular circumstances (i.e. outside of the context of a mass influx situation), it must be up to the potential refugee to demonstrate his or her eligibility for the rights proceeding from refugee status. This is an argument used at times by governments (see below V.2.).

The Refugee Convention does not say anything in terms of the Refugee Status Determination procedure as such. With respect to rights guaranteed by the Convention, there is no explicit discrimination between rights to be awarded after asylum has been granted and those stemming already *ipso facto* from meeting the criteria for refugee status. However, certain

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[36] Przemyslaw Saganek, The refugee crisis – a few remarks from the perspective of a lawyer, in: Kellerhals/Baumgartner (eds.), Perspectives of Security in Europe – Current Challenges, EU Strategies, International Cooperation, Zürich 2015, pp. 176-211, p. 186.

[37] Ibid.

provisions make references to different types of refugee presences in State Parties' territories. This suggests that certain rights or obligations only exist with respect to refugees whose stay has been formalized.[38]

b. Concept of asylum

Understood as long-term protection, asylum remains separate and different from the general obligations of States under the Refugee Convention. In fact, the Convention only mentions asylum in the Preamble, where it recognizes that the "the grant of asylum may place unduly heavy burdens on certain countries". It is also foreseen that international cooperation on this issue is necessary.

Regarding the United Nations system, the asylum is mentioned in the Universal Declaration of Human Rights (UDHR). However, the "right to asylum" under UDHR was differentiated from the principle of non-refoulment under International Refugee Law because it did not oblige States to actually grant asylum to refugees (this stands in distinction to the obligation of non-refoulment, which is absolute). This implies that States had undertaken an undisputed obligation to refrain from the forced return of refugees, but did not have a corresponding obligation to provide durable solutions for their situation.[39]

The Declaration on Territorial Asylum was unanimously adopted by the UN General Assembly in 1967. However, certain obligations, including those related to the principle of non-refoulment, were fleshed out to a much greater extent, yet an obligation to grant asylum never materialized, and remained confined in broad terms to documents which were not *de jure* binding.

The difference between the regimes of asylum and the 1951 Refugee Convention is important for establishing how the manner in which a State may choose to implement its international obligations may, at times, be

[38] KILIBARDA, Obligations of transit countries under refugee law: A Western Balkans case study, p. 222.

[39] Ibid., p. 223.

at odds with those very obligations. In general, providing an asylum system for refugees is extremely beneficial, and may even go beyond what is strictly required by the Refugee Convention. However, conditioning the protection of the latter on requesting asylum can in practice undermine its implementation. Regardless of whether or not a State may grant permanent protection, individual rights as guaranteed by the Refugee Convention must be respected as soon as the conditions for their application have been met – irrespective of whether or not a formal procedure has actually been followed. This final point is crucial to understanding the position of transit countries, which are not really "countries of asylum" but remain bound by refugee law nonetheless.[40]

c. Subsidiary protection

Across Europe, the National Refugee Status Determination procedure is referred to as the "asylum procedure". While "asylum" is closely related to the notion of refugee status, the terms are not synonymous. Asylum may refer to the procedure of granting protection to a foreigner, as well as a protection itself. So, just as a refugee may not be a beneficiary of asylum, a person granted asylum may also not meet the criteria of the Refugee Convention for refugee status.

As a result of developments in International Refugee Law, many countries have instituted *subsidiary protection* as a type of protection status granted specifically to persons who do not meet the definition of a refugee, but whose return to their country of origin would nonetheless be in violation of peremptory norms of International Refugee Law. When it comes to the Republic of Serbia, this country legally foresees the possibility of granting subsidiary protection to persons who are not refugees but who may nevertheless be at risk of serious human rights violations. It should be noted that beneficiaries of subsidiary protection do not enjoy the full spectrum of refugee rights.[41]

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[40] Ibid., p. 224.

[41] Ibid., pp. 222-223.

2. Obligations of transit countries under refugee law

It is reasonable to assume that, at least in terms of rights for which enjoyment the Convention establishes no further conditions, the obligations of a transit country are no different from those of a destination country.

In Serbia (as well as in other Western Balkan countries), however, several groups of arguments have been put forward asserting the contrary. They are of both a legal and a factual nature and may be heard, *mutatis mutandis*, in the context of other transit countries as well.

The most common argument is that persons who do not seek asylum are not, in fact, entitled to the protection of the International Refugee Law. When discussing the obligations of their respective countries, Western Balkan leaders often highlight that they only have legal obligations towards persons requesting asylum. These statements further suggest that any assistance provided to refugees and migrants who do not request asylum remains a question of policy, rather than law, and represents a measure of countries' "hospitality".[42]

Furthermore, Serbian leaders often argued that certain national groups travelling along the route come from countries where there is no armed conflict. Therefore, they cannot be refugees. The persons travelling along the route have already passed countries where they could have applied for asylum and are therefore not entitled to protection in other countries.

Bearing in mind that the Refugee Convention continues to be applicable to refugees transiting through a particular country, the question remains: What rights are guaranteed by this treaty that such persons may benefit from? In the other words, what is the scope of minimal standards of protection applicable to refugees in transit?

Even a brief look at the Convention is enough to realize that different provisions of the Convention provide different "criteria of entitlement".

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[42] Ibid, p. 225, FN 95.

Although the Convention's consistency is questionable, three general categories may be distinguished: simple presence, lawful presence and lawful residence.

With respect to rights granted to refugees simply present in the territory of the State party, there is no doubt that such rights are likewise owed to refugees merely transiting there. These rights include at least those guaranteed by Article 3 (non-discrimination), 4 (religion), 16(1) (access to courts), 20 (rationing), 27 (identity papers), 31 (exemption from penalization for unlawful entry or stay) and most important 33 (non-refoulment).

However, even this core of the Convention rights may be read as having a broader scope than simply being applicable to refugees in transit. For some of them it is obvious that some sort of initiative must be shown on the part of the refugee before the relevant provision can become applicable. Article 31 presents an example of such a right. Generally, it requires that in order to be exempt from punishment for unlawful entry or stay, refugees "coming directly" from their country of origin must "present themselves without delay to the authorities and show good cause for their illegal entry or presence". As the provision sets a number of conditions to be fulfilled in order for the refugee to enjoy this right – although some domestic legislation actually opts to drop one or more of them – the crux of the matter is that it is generally not upon the authorities to determine the existence of such circumstances on their own initiative.[43]

Hence, in a situation of mass migrations, States through which these people transit have the legal obligation to refrain from any manner of forced return. This holds true even of those persons who refuse to submit an asylum application on their territory, without undertaking a fair and effective determination of whether the return must lead to a violation of the individual's rights. No discrimination is allowed with regard to a refugee. Transit countries also must provide basic shelter and supplies to all vulnerable migrants, regardless of their status.

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[43] Ibid, 234.

VI. Concluding Remarks

Concluding remarks can be summarized on three levels: EU level, transit countries' level and Serbia's level.

With respect to the European Union itself, to respond to future needs, EU countries should agree on a comprehensive and balanced human mobility strategy based on a holistic concept of migration management that combines security and solidarity elements. In other words, Member States need to enhance the notion of a 'protective Europe' while avoiding the pitfalls of a 'fortress Europe'.[44]

As regards the position of transit countries, at present, positive international law may place only very limited obligations on transit countries. In times of mass influx, International Refugee Law remains applicable to refugees in transit countries and regardless of whether they have actually requested protection in the receiving State. However, the scope of rights provided may remain limited to the prohibition of refoulement, non-discrimination, non-penalization and humanitarian assistance.

Finally, when it comes to Serbia, a proper response to the refugee and migrant movement needs to be organized on two parallel tracks. First, urgent short-term measures have to be taken to ensure that legal protection, as well as humanitarian assistance, is provided to refugees and migrants. One can say that Serbia is quite successful in accomplishing this task. And second, in order for transit countries to actually become destination countries, long-term asylum sector reform with a focus on the integration of beneficiaries of international protection is required. In Serbia, such reform is scheduled to take place as a part of EU accession. However, it is very important to highlight that establishing strong protection mechanisms at the national level presents a value as such, and should be the country's goal, independently of the European integration process.

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[44] <https://www.newpactforeurope.eu/documents/new_pact_for_europe_3rd_report.pdf?m=1512491941&>.

Taking Public Interests Seriously? Security as a Legitimate Aim in Constitutional Adjudication in Russia

ALEKSEI V. DOLZHIKOV

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I. Introduction

1. Statement of problem

Security is one of the widest and open-ended concepts. Each discipline focuses only on its particular aspects. Global constitutionalism recognizes security as a public aim that justifies interference with constitutional freedoms. At the same time security is a basis for broad discretion of governmental bodies. In constitutional adjudication, security is part of

the proportionality analysis, which requires to test the legitimacy of public objectives. Most often, the security issues arise in "hard" cases concerning the measures to combat terrorism, illegal migration, and other risks of the modern era. The proportionality principle itself has been studied in great detail[1] and is being considered as evidence for the emerging global constitutionalism.[2] At first glance the requirement of legitimate aim is a simple exercise for the courts and an easy test to pass for governments especially for introducing security measures. Therefore, this sub-principle of proportionality didn't receive proper attention in the doctrine.[3] Security analysis as a legitimate aim could fill this gap and bring added value to the academic discussion.

Although, how could the experience of the Russian Federation be useful in this context? Some doubts are cast upon it with regards to the explicit recognition of this country as a main threat of the Common Foreign and Security Policy in Europe. Russia has demonstrated during its transition period from a soviet system different models dealing with a balance between security and fundamental freedoms in constitutional adjudication. It evolved from taking a more liberal approach during the establishment of the Constitutional Court of the Russian Federation in the early 1990s to a more conservative model in its modern case-law. The main argument of the paper was put in the title by rephrasing Dworkin's famous metaphor on rights as trumps.[4] Constitutional adjudication as a guiding institution of the Russian legal system is characterized by overestimation of weight, which is attached to public interests. Moreover, when being

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[1] Barak Aharon, Proportionality: constitutional rights and their limitations, Cambridge: Cambridge University Press, 2012; Jackson Vicki C./Thushnet Mark (eds.) Proportionality: new frontiers, new challenges, New York: Cambridge University Press, 2017; Francisco Urbina J., A critique of proportionality and balancing, Cambridge: Cambridge University Press, 2017.

[2] Stone Sweet Alec, Mathews Jud, Proportionality balancing and global constitutionalism, Columbia Journal of Transnational Law, 2008, vol. 47, pp. 72–164.

[3] Gordon Richard, Legitimate Aim: A Dimly Lit Road, European Human Rights Law Review, vol. 7, 2002, no. 4, pp. 421–427; Engel Christoph, Das legitime Ziel als Element des Übermaßverbots. Gemeinwohl als Frage der Verfassungsdogmatik, In: Brugger (hrsg.) Gemeinwohl in Deutschland, Europa und der Welt, Baden-Baden: Nomos-Verl.-Ges. 2002, pp. 103–172.

[4] Dworkin Ronald, Taking rights seriously, Cambridge: Harvard University Press 1977, p. XI.

viewed as analogous to playing cards security is not even seen as a trump, but rather as a joker which is able to justify any wide interference with most fundamental individual freedoms. In this sense, the case-law of Russia can be relevant for the difficult strategic goal-setting of Europe itself, which faces such powerful internal enemies as right-wing populism and the denial of the fundamental values of liberal democracy. Thus, the aim of this paper is to provide an analysis of security as a legitimate aim in constitutional adjudication in Russia.

2. Paper structure

The structure of the paper is as follows. It starts in *the second section* with a short overview of the social context of security in Russia. Socialist tradition demonstrates that the overemphasizing of the importance of security and other public interests could lead to the serious violations of constitutional rights. *The third section* of the paper presents two methodological approaches to the balance between constitutional rights and security. The early case-law of the Constitutional Court of the Russian Federation reflects rare examples of trumping constitutional rights for security reasons. In this section the author also argues that the modern case-law of the Constitutional Court could be described as trumping public interest in general and security policies in particular over most fundamental individual freedoms. Finally, the *forth section* of the paper analyses different models of intensity of judicial review from minimum to maximum scrutiny. The core argument of this paper is that scrutiny of public aims should depend on several factors such as the need for ad hoc balancing in both an historical and social context; the status of the decision-maker; the importance of the right concerned; the subject-matter of the dispute; the need for budget funding; fact-finding and burden of proof; decision-making in good faith.

II. Security in the Social Context of Russia

Security, like any public aim justifying the limitation of fundamental rights, cannot be understood outside the social context of certain society. For analysis of security in Russia one should take into account the survival of the socialist legal tradition.[5] For example, a recent public opinion survey conducted by the Levada Center, a major independent pollster showed that more than 70 % of Russian evaluate positively the historical role of Stalin who built policy by way of combating an "enemy of the people"[6] (Russian: vrag naroda). More specifically almost half of the citizens in 2019 think that the human sacrifices that people suffered in the Stalin era were justified by the great goals and outcomes that were achieved in the shortest possible time.[7] There are also the factors of the positive image portrayed of a bloody dictator who allegedly managed most challenges in internal and external security influences indirectly, the legal order, as well as constitutional adjudication.

Public opinion polls also indicated that security issues were less valued than issues adhering to social welfare. The main complaints of the majority of citizens (57%) regarding the current government is its failure to deal with rising prices and falling incomes. Only a small number of respondents (9%) believe that the government cannot ensure the security of citizens and protect them from terrorist attacks.[8] Therefore it can be deduced that citizens think government agencies are good at dealing with the main challenges to national security.

Using the analogy with the well-known metaphor of R. Dworkin, security and other public interests in Russia could be considered as a trump card

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[5] Manko Rafal, Survival of the socialist legal tradition? A Polish perspective, Comparative Law Review, 2013, vol. 4, no. 2, pp. 1–28; Uzelac Alan, Survival of the Third Legal Tradition?, Supreme Court Law Review, 2010 (2d), vol. 49, pp. 377–396.

[6] Goldman Wendy Z., Inventing the enemy: denunciation and terror in Stalin's Russia, New York: Cambridge University Press, 2011.

[7] Levada Center. <https://www.levada.ru/2019/04/16/dinamika-otnosheniya-k-stalinu/>

[8] Levada Center. <http://www.levada.ru/sbornik-obshhestvennoe-mnenie/obshhestvennoe-mnenie-2018/>

in their conflict with the private ones. Accordingly, the main argument here is that social context and the long-standing Russian tradition of deference to security measures presupposed the high priority of public interest in comparing the individual freedoms.

III. Rights as Trumps vs. Security as Trump

1. Rights as Trumps?

In his book "Taking rights seriously" and a little bit later in a separate article,[9] R. Dworkin makes the powerful argument pro-western constitutionalism of rights as trumps. "Rights, – in the view of legal philosophers, – are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole".[10] This argument is a reaction to the ideology of utilitarianism, which highlights the happiness and welfare of the community as a supreme goal of politics. From this point of view a communist system had tried both to utilize general welfare and to neglect individual rights as the founder of utilitarianism J. Bentham did.[11]

Accordingly, as an antithesis to the complete neglect of individual liberty in soviet time the art. 2 Constitution of the Russian Federation from December 12, 1993[12] (Constitution) should be interpreted, which stated that "the human being, its rights and freedoms are the supreme value. The recognition, compliance with and protection of the human rights and freedoms of the citizen are the duty of the State". This constitutional provision seems to be an idealistic declaration rather than a directly applicable rule, especially in the light of the very wide discretion given to

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[9] Dworkin Ronald, Rights as trumps, in: Kavanagg, Oberdiek (eds.), Arguing about law, London; New York: Routledge, 2009, pp. 335 - 344.

[10] Ibid. P. 335.

[11] Bentham Jeremy, Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution, in: Bowring (ed.) The works of Jeremy Bentham, vol. 2, Edinburgh, London, 1843, pp. 489 - 534.

[12] Russian Gazette [Rossiiskaia gazeta] of 25 December 1993.

the legislative power by general statutory clause (art. 55.3 Constitution). Under the latter "state security" among other public interests gives the power to the Federal Assembly of the Russian Federation to limit constitutional rights, although "only to the extent necessary".

Recognition of rights as trumps, particularly in the connection with national security, is extremely rare in Russian constitutional adjudication. One could find the application of such a liberal doctrine only in the early case-law of the Constitutional Court of the Russian Federation. An example of such is the Judgment of 14 January 1992 no. 1-P-U which concerned the creation by Decree of the Russian President of the Unified Ministry of State Security and Interior. The Constitutional Court holds that the activities of those agencies "are at the same time associated with real restrictions of constitutional rights … separation and mutual deterrence of state security and internal affairs organs provides a constitutional democratic system and is one of the guarantees against the usurpation of power".[13]

Now the assessment of the constitutionality of the actions of the Russian President aimed at ensuring security does not even become the subject-matter of constitutional proceedings. For example, in 2015 a resident of Sochi challenged a Presidential decree which, among other measures, prohibited rallying in order to protect security during the 2014 Olympic Winter Games. The Constitutional Court in its Decision of 17 February 2015 No. 266-O rejected the petition on procedural grounds arguing that the Decree of the Russian President had already ceased its operation by the time of the opening of proceedings and could not affect the constitutional rights of the applicant.[14]

In summation, The Constitutional Court more often doesn't trump the fundamental freedoms over the interests of security. More often it has utilized the ideology of judicial self-restraint giving significant deference to political decision-makers.

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[13] Herald of the Constitutional Court of the Russian Federation [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii]. 1993. no. 1. (in Russian).

[14] Unpublished, available at <http://doc.ksrf.ru/decision/KSRFDecision189324.pdf> (in Russian).

2. Security as Trump

The most remarkable feature of constitutional adjudication in Russia in recent years is the exaggeration of the public interests over the constitutional rights. A general observation regarding the increasing importance of public interests can be found in the dissenting opinion of judge A.L. Kononov (Judgment of 19 December 2005 No. 12-P). He pointed out what was clearly a negative point, "[a] tendency of excessively wide use of the term "public" as a justification for intervention of the government in freedom … [and other] spheres of personal interests of citizens and of corporations. A position when public grounds justify and cover any restriction of principles of freedom… poses doubtless threat for all individual rights".[15]

Trumping security as public interests represents the so called Beslan Case (Decision of 19 February 2009 no. 137-0-0).[16] The case involved the anti-terrorism legislation which prohibits the negotiations on the political claims of terrorists. The victims of terrorist attack of school no. 1 in Beslan in September 2004 argue that such a statutory rule limits the right to life, freedom and personal integrity. The Constitutional Court of the Russia holds that the prohibition of negotiations «aims at the prevention of terrorism threats, and consequently at the protection of security and of the life of individuals, i.e. conforms with constitutionally recognized values and couldn't be seen as violation of constitutional rights of applicants… assessment of legality, reasonableness and utility of actions of administrative bodies and its officials during the anti-terrorist operation in particular the chosen strategy of combating a terrorist attack (the use of force or negotiations) as well as tactics for organization and conducting of negotiations with terrorists are outside the jurisdiction of The Constitutional

[15] Herald of the Constitutional Court of the Russian Federation [Vestnik Konstitutsionnogo Suda Rossiiskoi Federatsii]. 2006. no. 1. (in Russian).

[16] Unpublished, available at <http://doc.ksrf.ru/decision/KSRFDecision18743.pdf> (in Russian).

Court". This decision not only reaffirmed the paramount value of security but also demonstrated the ideology of judicial self-restraint, which became a very popular technique in constitutional adjudication.

3. Security as an abstract concept

The Beslan case represents the abstract character of security. Due to self restraint the ideology of the Constitutional Court had issued only the decision on admissibility, but not the judgment on merits. The court gave in that decision no detailed interpretation of the security concept. The decision on such a terrible massacre of most unprotected group is only 3 pages (1490 words). The Court also initially decided not to publish it in any officially periodicals. Of course, one could access the decision via the official website of The Constitutional Court or via legal databases. However without proper transparency the vague content of security is unacceptable and could lead to the risk of serious constitutional rights violations. Quite an opposite approach was used for constructing the security concept used for The European Court of Human Rights in case Tagayeva and others v. Russia,[17] which also involved the same Beslan tragedy. A Judgment (on merits and just satisfaction) of 13 April 2017 included the detailed argumentation on more than 134 pages (89239 words). In addition to the interpretation of the security concept, the Court has also chosen the ideology of judicial activism.

IV. Intensity of Judicial Review

The difference of methodology to security from earlier to late decisions of the Constitutional Court of the Russian Federation, as well as the quite opposite approach to this public interest in the case-law of the European Court of Human Rights, demonstrate the issue of the intensity of judicial review. There are varying degrees in reviewing the regulatory measures

[17] Tagayeva and Others v. Russia, nos. 26562/07 and 6 others, 13 April 2017, in: Reports of Judgments and Decisions. 2017 (extracts).

in cases concerning national security.

Levels of scrutiny have been found in the case-law of the US Supreme Court during Roosevelt's "New Deal".[18] This era was connected with government intervention in various spheres of society. The US Supreme Court has pointed out some spheres where the scrutiny of governmental measures should be increased (for example, in the discrimination of vulnerable groups). The doctrine usually distinguishes three levels of scrutiny: a test of rational basis, intermediate scrutiny, and strict scrutiny.[19] In other words, there is a minimum, intermediate, and maximum intensity of judicial review.

1. Maximum intensity of judicial review

Maximum intensity of judicial review of regulatory measures has its source in the activist ideology of the courts. Such a kind of judicial review is used so that courts can scrutinize public policies chosen for security reasons. For example, in a landmark US case, decided in 1879 by The Circuit Court for the District of California, a so-called technique of smoking out of hidden legislative intent was used.[20] Ho Ah Kow v. Nunan concerned San Francisco regulations that allowed for the cutting of the hair of prisoners. Although a formal purpose of that regulation was sanitary security, the challenged rules were targeted only on immigrants from China. At that time Chinese men traditionally had to keep their hair long. The court holds the regulation unconstitutional and has smoked out de facto the discriminatory intent of San Francisco lawmakers trying to prevent migration from China.

Maximum intensity of judicial review is a rare technique for courts in Russia today. There are few cases in which the Constitutional Court used

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[18] United States Supreme Court, decided April 25, 1938 "United States v. Carolene Products Co.", In: United States Supreme Court Reports, 1938, vol. 304, p. 144.

[19] Chemerynski Erwin, Constitutional law: principles and policies, New York: Aspen Publishers, 2006, p. 477.

[20] 9th Circuit Court, D. California, decided 07.07.1879, Ho Ah Kow v. Nunan <https://law.resource.org/pub/us/case/reporter/F.Cas/0012.f.cas/0012.f.cas.0252.pdf>.

purpose scrutiny. An example is the case of Avanov, which concerned the requirement for Russian citizens to apply for a travel passport only in place of their permanent residence but not in place of temporary residence.[21] In the case of Russian citizen Avanov who has permanent residence in Tbilisi (Georgia), he tried to apply for travel passport in Moscow where he actually resided. The trial court rejecting the complaint of Avanov came to the absurd conclusion that Russian citizens should apply for travel passport outside of Russia, i.e. in the Republic of Georgia. The Constitutional Court had found that "the procedure of travel passport issuance only at a place of residence is discriminatory... Circumstances preventing a citizen's exit from the Russian Federation are mainly examined by territorial internal affairs bodies at the citizen's place of residence. It is determined only by the purpose of rationalizing their activities". Consequently, the Constitutional Court had recognized that the comfort of an administrative agency is an illegitimate aim for restricting constitutional rights.

The European Court of Human Rights sometimes exercises scrutiny of the illegitimate aim of the Russian Government. In the Judgment from May, 19 2004 «Gusinsky v. Russia» The Strasbourg Court found that criminal proceedings against Russian oligarch Gusinsky were a restriction of his right to liberty and were used for the illegitimate aim of the acquisition by a state-controlled corporation of the applicant's private media company. As the European Court of Human Rights stated "it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies ... applicant's prosecution was used to intimidate him".[22] It's self-evident that scrutinizing the hidden intent of the public authorities required the independence of the court and judicial activism.

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[21] <http://www.ksrf.ru/en/Decision/Judgments/Documents/1998 January 15 2-P.pdf> (In English).

[22] Gusinskiy v. Russia, no. 70276/01, § 76, ECHR 2004-IV.

2. Minimum intensity of judicial review

However, in the absolute majority of cases in The Constitutional Court of the Russian Federation, government bodies didn't have any difficulty in the legal reasoning of the legitimacy of security policies. In particular in the Judgment of 19 April 2010 no. 8-P, concerning the abolition of the jury trial for persons accused of terrorism crimes, The Constitutional Court recognized the wide discretion of the legislative. The minimum intensity of the judicial review allowed security policies, despite the explicit textual basis in art. 20.1 of The Russian Constitution, to transform the possible participation of the jury in the cases of terrorists into a statutory right. In the view of The Constitutional Court the right to trial by a jury "is not one of the fundamental inalienable rights and belongs to everyone from birth … this right – unlike the right to an independent and impartial court or presumption of innocence is not included in the main scope (core) of the constitutional right of access to court".[23]

Another Judgment of the Constitutional Court of 28 June 2007 no. 8-P, concerning the legislative ban on returning to a family for burial a series of bodies killed during terrorist attacks, also showed considerable respect for the approaches of political organs to ensure national security.[24] The Constitutional Court had stated that "…the interest in fighting terrorism, in preventing terrorism in general, in specific terms and in providing redress for the effects of terrorist acts, coupled with the risk of mass disorder, clashes between different ethnic groups and aggression by the next of kin of those involved in terrorist activity against the population at large and law-enforcement officials, and lastly the threat to human life and limb, may, in a given historical context, justify the establishment of a particular legal regime… Action to minimise the informational and psy-

[23] Collected Legislation of the Russian Federation [Sobranie Zakonodatelstva Rossiiskoi Federatsii] (SZ RF). 2010. no. 18. Item 2276 (in Russian).

[24] SZ RF, 2007, no. 27, Item 3346 (in Russian).

chological impact of the terrorist act on the population, including the weakening of its propaganda effect, is one of the means necessary to protect public security".

The concept of an enemy of the people who survived in public opinion since Stalin's era seems to be decisive for the legislative stigmatization of NGOs which received financing from foreign governments or from international funds. The Constitutional Court in the Judgment of 8 April 2014 no. 10-P agreed with the vague interpretation of the concept of political activity of groups, which, combined with its funding from foreign sources, leads to the special legal status of NGOs as a foreign agent. The Constitutional Court held that "everyone's right of association and freedom of activity of public associations are not absolute… realizing law-making powers belonging to him, the federal legislator must care about granting citizens maximum wide opportunities for use of the right of association and freedom of the activity of public associations guaranteed by the Constitution of The Russian Federation and at the same time establish such rules that, not infringing upon its very essence, would make for attainment, on the basis of the balance of private and public elements, of constitutionally-significant goals, including the ensuring of public order and security".[25]

In this sense, security is no longer even a trump card, but rather a joker in a pack of playing cards.

3. Factors of intensity of judicial review

There are several factors that influence the intensity of judicial review. International tribunals sometimes list such factors. In the Judgment of 26 May 1993, which dealt with emergency measures combating terrorism in Northern Ireland, it was stated that in exercising its supervision the European Court of Human Rights "must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation,

[25] <http://www.ksrf.ru/en/Decision/Judgments/Documents/2014 April 8 10-P.pdf> (in English).

the circumstances leading to, and the duration of, the emergency situation" (para. 43).[26] Hence, the intensity of judicial review over governmental actions will depend on the importance of the fundamental right concerned, and the historical and temporal conditions of interference with this right.

The factors that influence the intensity of judicial review can be found in case-law of national courts. In the decision of 22 February 2002, regarding the measures taken to combat illegal migration, the England and Wales Court of Appeal pointed out such factors as: 1) greater deference is to be paid to an Act of Parliament than to a decision of the executive or subordinate measure; 2) unqualified rights due to their great importance require more scope for deference; 3) greater deference will be due to the democratic powers where the subject-matter at hand is within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts; 4) greater or lesser deference depends on whether the subject-matter is within the expertise of political bodies (for example, macroeconomic policy) or courts (for example, the protection of human rights) (para. 83–87).[27] Consequently, the intensity of judicial review depends on the branch of government that adopted the challenged instrument, the importance of the constitutional right concerned, the assignment of the subject of the dispute to the prerogatives of a particular body, as well as the possibilities for expert assessment of the relevant facts.

An example of a sliding scale in the intensity of a judicial review based on the difference in the subject-matter demonstrates the two cases of restricting the political rights of Russian citizens who have a stable relationship with foreign states. In the Decision of 4 December 2007 no. 797-O-O, security reasons allowed The Constitutional Court to show deference to the legislative deprivation of the electoral rights of Russian citi-

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[26] Brannigan and McBride v. the United Kingdom, Judgment, 26.05.1993 – 258-B.

[27] International Transport Roth GmbH v Secretary of State for the Home Department [2002] EWCA Civ 158.

zen Kara-Murza, who is also a citizen of the United Kingdom.[28] In a similar case, the unconstitutionality of the legislative restriction of participation in the work of election commissions to a citizen Malitsky, who had a residence permit in Lithuania, was recognized. In the Judgment of 22 June 2010 no. 14-P The Constitutional Court had emphasized the fact that " the existence of a residence permit does not lead to the granting for its holder of the political rights of a citizen of a foreign state... Although even granting those persons a certain scope of political rights does not at all mean the inevitable change of their status in relation to the country of their citizenship".[29]

V. Conclusions

In summation, taking into account the above-mentioned case-law and the analysis of the decisions of The Constitutional Court of the Russian Federation, the following factors regarding the intensity of judicial review can be defined: ad hoc balancing between rights and security in historical and social contexts; the status of the decision-maker restricting constitutional rights and its place in the separation of powers; the importance of the right in the hierarchy of constitutional values; the subject-matter of the dispute, including its attribution to the pure political or justiciable questions; the need for budget funding; fact-finding and burden of proof; decision-making in good faith, including the fair procedures and the quality of the reasoning.

[28] SZRF. 2007. No. 52. Item. 6533. (In Russian).
[29] SZRF. 2010. No. 27. Item. 3552. (In Russian).

Human Rights Dimension of Cybersecurity

ALENA F. DOUHAN

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I. Introduction

Cyber technologies have already changed our lives drastically. Nearly every area of social relations is currently being digitalized. We currently discuss not only Internet law, but also a digital economy, electronic governance, electronic arbitration or justice, digital university etc. Changes are so drastic that they may be compared with the transfer from agrarian natural households to industrial systems of social relations. It is apparent that all of these changes are influencing the status of individuals a lot as well as affecting their rights in different areas.

Cyber technologies, networks, and operations have all developed substantially in their current state. Individuals spend so much time online that it has already became common to speak about a cyber space,[1] cyber-threats and cyber-security.

[1] KULESZA, International Internet Law, Routledge, 2012, pp. 1–29.

In cyber space individuals or a groups of individuals may be very influential and very effective as concerns their impact to other individuals, legal persons, states or international organizations. This assessment becomes all the more logical in view of the recognized possibility also by a group of experts on the developments in the sphere of information and telecommunications (A/70/174 of 22.07.2015) and that the use of cyber means also by private persons may constitute a threat to the international peace and security (para. 3).[2]

This process however, is not one-sided. Fundamental human rights including the right to life are also often infringed by activity in the cybersphere. As a result protection of human rights in the cyber age has already been repeatedly considered at the UN level, in particular, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[3] This issue, however, is hardly considered in International legal doctrine, but deserves the highest attention.

II. Cybersecurity: Notion and Threats

As mentioned above, the use of cyber means also by private persons may constitute a threat to international peace and security. Cyber security as well as activity constituting a threat to international peace and security have been repeatedly considered by the UN organs as well as by regional

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[2] Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security A/70/174 of 22.07.2015 <https://undocs.org/en/a/70/174>.

[3] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression A/HRC/35/22 of 6–23.06.2017. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/077/46/PDF/G1707746.pdf?OpenElement>; Report of the Special Rapporteur to the General Assembly on the temporary challenges to freedom of expression A/71/373 of 6.09.2016 <http://www.un.org/ga/search/view_doc.asp?symbol=A/71/373>; Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism A/HRC/34/61 of 21.02.2017 <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session34/Documents/A_HRC_34_61_EN.docx>.

organizations. Every regional organization involved in the maintenance of international peace and security (NATO,[4] CSTO,[5] CIS,[6] EU[7]) as well as states[8] develop and adopt legal regulation in the sphere.

Threats in the sphere of cyber security are formed by and conditioned by the following factors: IT forms/influences all aspects of contemporary life (as concerns individuals it affects civil, political, economic, social, cultural rights, collective rights as well as new human rights that appear with The Internet); legal regulation in the sphere is either absent or insufficient, existing regulation of offline relations cannot always be applied to the online sphere; IT may currently be used in a way which prospectively threatens international peace and security, including the activity of private individuals; fundamental human rights are changing in the cyber age; new rights are emerging; there is still a problem of limitation of existing rights, when exercised online; development of technologies do not always provide for the possibility of precise identification; attribution of activity of private individuals to states is also problematic.

Cyber security is a multidimensional notion. It may include security of states v. cyber threats, security of IT infrastructure, security of critical

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[4] Brussels Declaration on Transatlantic Security and Solidarity of 11.07.2018 <https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2018_07/20180713_PR-CP_2018_094-eng.pdf>.

[5] Declaration of the CSTO Council of Collective Security of 8.11.2018 <https://odkb-csto.org/documents/statements/deklaratsiya-soveta/?sphrase_id=60995>.

[6] Concept of Cyber Security in Military Area of the CIS Member-States of 4.06.1999 <http://www.e-cis.info/page.php?id=21396>.

[7] Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace. Brussels, 7.2.2013 <https://eeas.europa.eu/archives/docs/policies/eu-cyber-security/cybsec_comm_en.pdf>.

[8] Concept of National Security of Belarus of 9.11.2010, views as a threat to national security «illegal acts against individuals, expression [...] of religious, *ethnic extremism and racial hatered on the territory of Belarus*» (para. 27), «development of tecnologies of information manipulation» (para. 42) and other activity against cyber infrastructure or involving dissemination of information (para. 27, 34, 42) <http://www.pravo.by/document/?guid=3871&p0=P31000575>; Concept of Cyber Security of Belarus 18.03.2019 / confirmed by the Security Council of Belarus <http://www.pravo.by/upload/docs/op/P219s0001_1553029200.pdf>.

infrastructure, security of information, including classified information, financial security, security of personal information, security of individuals.[9]

International legal documents as well as state legislation are usually pretty silent on the security of individuals in the IT area. Concept of cyber-security of Belarus of 2019 provides a rare exception on this point, providing at least some regulation on humanitarian aspects of cyber security (the right to access to information, freedom of conscience, the right to privacy, and the functioning of mass-media, para. 9–11).

At the same time the number of human rights, including the profound human right the right to life, are infringed by activity that is threatening or is aimed at the maintenance of cyber security of states, on the first hand in the use of cyber-attacks as an armed attack, means or as methods of warfare.

[9] Agreement between member states of the ShCO on cooperation in the maintenance of international information security of 11.06.2009, Art. 2, Addenda 1, <http://docs.cntd.ru/document/902289626>; Draft agreement of the CIS Member-States in the Sphere of Maintenance of Cyber Security, 2010, Art. 2 (not in force), <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=EXP&n=532471&dst=100007#02430760043028977 7>; Cyber Defense Pledge of 08 Jul. 2016 <https://www.nato.int/cps/en/natohq/official_texts_133177.htm?selectedLocale=en>; Cybersecurity Strategy of the European Union (footnote 7), pp. 2-3.

III. Cyber-Attack in the Law of International Security

1. Cyber-attack as an armed attack /part of the armed attack

It is frequently discussed in the international legal doctrine whether cyber-attacks can be qualified as an armed attack or as a part of it. It is generally recognized that any military conflict results in the violation of the right to life as cited by the HRC in the GC No 14 (para. 2).[10] It may also be concluded that there results an emergence of an internal conflict due to the civilian disturbances as well as to any other internal disorder. All these facts and events are qualified as the threat or breach of the international peace and security by the UN Security Council (resolutions 161(1961) of 21.02.19614; 775(1992) of 28.08.1992; 929(1994) of 22.06.1994; 940(1994) of 31.07.1994 etc.).

As soon as a cyber-attack is qualified as an armed attack, the attacked state in accordance with art. 51 of the UN Charter is entitled to self-defense with the use of any conventional or any other means limited only by criteria of necessity and proportionality,[11] and the full-scale international military conflict appears. It is necessary thus to be very careful in this regard.

To qualify a cyber-attack as an armed attack, it shall correspond to all criteria listed hereafter. To be qualified as an armed attack a cyber-attack shall reach a level that endangers the very existence of a state,[12] causing

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[10] General Comment No. 14, HRC, 1984 <https://undocs.org/HRI/GEN/1/Rev.9(Vol.I)>.

[11] Roscini, World Wide Warfare – Jus ad bellum and the Use of Cyber Force, Max Plank Yearbook on the United Nations Law 2010, Vol. 14, p.119.

[12] Woltag, Cyber warfare, MPEPIL http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e280?rskey=eCCfoY&result=7&prd=EPIL&print; Dinstein Y. War, Aggression and Self-Defence. 3rd. edition, Cambridge, 2001, pp. 175–176; Frowein J.A., Legal Consequences for International Law Enforcement in the Case of Security Council Inaction in J. Delbrück ed. The Future of International Law Enforcement: New Scenarios – New Law?, 1993, pp. 114–115.

the loss of human lives, destruction or damaging of property including critical infrastructure,[13] or loss of the part of the territory.[14] It is maintained in the legal doctrine that there shall also be a causal link between a cyber-attack and negative consequences and that consequences shall be immediate (seconds or minutes between the attack and its results).[15]

Apparently the most dangerous types of cyber-attacks are so called "attacks over critical infrastructure" these are attacks over dams, nuclear electricity stations, interception of air defense system control,[16] attacks over arms control systems, bank accounts and operations, gas and oil pipelines, electricity lines, and other critical infrastructure. Sometimes attacks over bank and taxation systems (Estonia), governmental servers and computer networks (Georgia, 2008), South Korea and the USA (2009)[17] are also qualified by specific authors as such. It is believed here however that computers as well as computer networks and infrastructure are usually viewed as means for rather than as targets of the attack (exempting kinetic attacks over computer networks, espionage and distribution of propaganda online[18,19]) and cannot by themselves be qualified as an armed attack.

When we speak about human rights dimension, it shall be taken into account that rights of individuals are infringed not only in the course of armed attack but by a broader number of acts committed with the use of

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[13] SCHMIDT, "Attack" as a Term of Art in International Law: The Cyber Operations Context in C. Czosseck, R. Ottis, K. Ziolkowski ed. 4th International Conference on Cyber Conflict, pp. 287-288; Roscini (footnote 11), pp. 106-107.

[14] REICH/WEINSTEIN/WILD/CABANLONG, Cyber Warfare: A Review of Theories, Law, Policies, Actual Incidents - and the Dilemma of Anonymity, European Journal of Law and Technology 2010, Vol. 1 – issue 2, p. 26.

[15] DINNISS, H.H. Cyber Warfare and the Laws of War, Cambrige, 2014, pp. 63-73.

[16] Draft Report on Aggression and the Use of Force, May 2016, <file:///C:/Users/Conver/Downloads/Draft Conference Report Johannesburg 2016..pdf>, p. 18.

[17] REICH et al (footnote 14), pp. 12-17.

[18] ROSCINI (footnote 11), p. 96.

[19] ROSCINI, Cyber Operations and the Use of Force in International Law, Oxford, 2016, p. 4

cyber means. Any sort of attack over critical infrastructure which results in the loss of life constitutes a clear breach of the right to life also in the absence of the state of war.

Attacks over cyber infrastructure, bank system etc. may result in the violation of economic and social rights. Any cyber-attack over critical infrastructure resulting in the loss or damage to property is also infringing economic and property rights. Therefore, activity in cyber area may constitute a threat to the security of the state (military, political or economic) and simultaneously infringe civil or economic rights of individuals.

It is not the purpose of this article to explore in detail the very nature of state obligation to guarantee the scope of state responsibility to protect human rights also in the online era, it is believed here however that states are supposed to exercise due diligence and to take all necessary means to guarantee that their territory as well as cyber infrastructure at its territory are not used for activity which may undermine the security of other states as well as the human rights of individuals of this state or its own citizens.

2. Cyber-attack as the means of warfare

Another part of the problem is the use of cyber means in the course of military conflicts of both an international and a non-international character. International humanitarian law does not set the exhaustive list of the means and methods of warfare (Additional protocol I, art. 36.[20]) As it has already been shown above, cyber-attack over critical infrastructure may result in the loss of lives as well as in the destruction of property and therefore may be qualified as the means and method of warfare.

Moreover in the contemporary world communication systems and infrastructure gain strategic importance in the course of military conflict. The

[20] Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international military conflicts (Protocol I), of 8.06.1977, <https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf>.

opinion is increasingly maintained such that they lose the status of civilian objects and turn them into military ones, and therefore become legitimate targets in the course of military conflict [[21], п. 14–16]. Attacks over these objects will result in the loss of life of civilian populations as long as employees of ITC infrastructure are not combatants. Military operations endanger the rights of this group of civilians more than the traditional hardships of war.

Humanitarian concerns shall also be considered when looking at the objects of cyber-attacks. As mentioned above, cyber-attacks are primarily aimed at the critical infrastructure. However, attacks over the overwhelming majority of this infrastructure will cause non-selective damage; some of them may also be qualified as "works and installations containing dangerous forces" in accordance with Art. 56(1) of Additional Protocol I (dams, dukes and nuclear electrical generating stations etc.), "*which shall not be objects of attack even if these objects are military objectives, if such an attack may cause the release of dangerous forces and consequently severe losses among the civilian population*". Therefore cyber-attacks over these objects are strictly prohibited by international law and if they happen will constitute "grave breaches" of international humanitarian law in accordance with art. 85 of the Additional protocol I 1977 and are a clear violation of the right to life.

The same situation exists for the use of autonomous systems in the course of military conflicts, in particular drones and robots, both individually or by swarms. Military assessment of the possibility of discloses the possibility to kill a substantial quantity of combatants (in the best case). International humanitarian law however, seeks to decrease the level of human suffering and the loss of life. Therefore military operations are to seek to disable combatants of the adversary, rather than precisely to kill him. Moreover, the use of autonomous systems does not preclude the possibility of mistaken identity when targeting specific individuals.

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[21] WOLTAG (footnote 12).

Moreover, the UN Special Rapporteur on Human Rights while countering terrorism in its report 34/61 of 21.02.2017 extensively criticizes an emerging practice to use drones for targeted killings of terrorist leaders when it happens outside the commission of the specific terrorist act. I would like to add here the opinion that this activity constitutes a clear violation of the right to life of the targeted person as well as people, which may happen to be nearby; no procedural guarantees are observed (ICCPR, art. 14) and the presumption of innocence (ICCPR, art. 14(2)) is also violated. In practice the use of drones for targeted killing in the considered situation could be qualified as the death penalty exercised without any guarantees, that is a clear violation of the international legal standards also as concerns the commission of international crimes including war crimes (art. 3 common for all Geneva conventions 1949, Additional protocol I, art 75(4)).

It shall also be noted that in the absence of proper regulation and in a view of repeated violations the UN General Assembly calls on states to observe procedural guarantees as well as other Human rights and IHL norms also while countering international terrorism (resolution 68/178 of 18.12.2013, para. 6, 17; HRC resolution 35/34, para. 8 – 9, 11; UN SC resolution 2178 (2014) of 24.09.2014, preamble). It can thus be concluded that the use of autonomous systems for targeted killings constitutes a clear violation of the rights to life (see also Additional protocol I 1977, Art 75(2a(i))).

3. Cyber-attack as the method of warfare

It is also believed here that IT could be qualified as a method of warfare. In this case cyber means are used as a means to transfer information easily to apply psychological pressure over populations and combatants[22] by cutting off internet access, distribution of hostile information or propaganda, incitement of racial, religious, social hatred, acts of terrorism.[23] Decision of the International Rwanda Tribunal (Case No. ICTR-99-52-A)

[22] Chainoglou, Psychological warfare, MPEPIL, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e385?rskey=CEUI1l&result=15&prd=EPIL>, para. 3.

[23] de Branbandere, Propaganda, MPEPIL, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e978?rskey=9jDC14&result=9&prd=EPIL>.

may be cited as a good example of such a case. Founders of the TV and radio companies as well as editor-in-chief of the newspaper Kangura have been recognized as guilty for "instigated genocide through matters published" or 'clearly and effectively disseminated through RTLM and Kangura",[24] which resulted in mass killings with the "intent to destroy, in whole or in part, the Tutsi ethnic group".[25]

It shall also be considered that the distribution of this specific information is by itself considered to be a grave violation of international humanitarian law. In particular, Additional Protocol I in art. 40 clearly prohibits to threaten an adversary "to an order that there shall be no survivors".

These sorts of activities enhance the intensity of the conflict, constitute a violation of international humanitarian law as well as a number of rights in the human rights law.

IV. Cyber-Attack and State Security in the Peace-Time

When one speaks about peace-time the use of cyber means may still threaten security and stability of the state and constitute a violation of human rights. Besides the attacks over critical infrastructure, which infringe political and economic security of the state, it is necessary to assess the influence of the transferal of information over the security of states and individuals. Special attention shall be paid in this regard to the right to privacy (ICCPR, Art. 17) and to the freedom of opinion and expression (ICCPR, art. 19, 20).

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[24] Scordas, Mass media? Influence at international relations, MPEPIL, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e960?rskey=hc4dVE&result=2&prd=EPIL>, para. 51.

[25] International Criminal Tribunal for Rwanda Case No. ICTR-99-52-A Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze (Appellants) v. THE PROSECUTOR, Judgement of 28.11.2007 http://www.worldcourts.com/ictr/eng/decisions/2007.11.28_Nahimana_v_Prosecutor.pdf pp. 157 – 201, 316 – 320.

Apparently due to the easiness of distribution of any sorts of information via the Internet, the high level of anonymity, attribution problems as well as an insufficient level of legal regulation, the treatment of information and consequently the legal regime of the freedom to hold opinions and expression needs special regulation in the cyber world without changing the system as such. It is thus necessary to adapt the rules to provide the possibility to "apply online the same rules as are applied offline".

It is repeatedly noted that abuses of freedom of expression (in particular, distribution of hostile propaganda, incitement of overthrow of governments, racial, national, religious or other hatred, involvement into terrorist activity[26]) may have resulted in really serious negative consequences, including civilian disturbances and the emergence of hostilities.

Theoretically the situation is rather clear from the legal standpoint. In accordance with article 20 of the ICCPR, "any propaganda for war, as well as any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Article 19 (3) provides for the possibility to impose under certain conditions restrictions necessary "for respect of the rights or reputations of others; For the protection of national security or of public order (ordre public), or of public health or morals". The same approach was taken by the CCPR in General comments No 34[27] (see also report 66/290 of 10.08.2011, para. 24–30, 46.[28]) In General comments 11 the CCPR insisted that the introduction of any restrictions imposed by law in accordance with art. 19, 20 of the ICCPR "are fully compatible with the right of freedom of expression". The CCPR insists on the existence of the obligation for states to «adopt the necessary legislative measures" prohibiting activ-

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[26] de Branbandere (footnote 23).

[27] General comment 34, Article 19, Freedom of opinion and expression CCPR /C/GC/34. <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

[28] Report of the Special Rapporteur to the General Assembly on the right to freedom of opinion and expression exercised through the Internet, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/449/78/PDF/N1144978.pdf?OpenElement>.

ity referred to in art. 20.[29] Constitution of International Telecommunication Union provide for the possibility to stop "the transmission of any private telegram which may appear dangerous to the security of the State or contrary to its laws, to public order or to decency" (art. 34).[30] Genocide convention 1948 imposes obligation over states to criminalize "direct and public incitement to commit genocide" (art. 3).[31]

At the same time the UN Special Rapporteur on the freedom of opinion and expression (hereafter, Special Rapporteur) points out that instances of incitement of hatred take place in all regions of the world (report 67/357 of 7.09.2012, para. 24–29.[32] It is not also possible to interpret limitations too broadly or arbitrarily because it will result in the violation of the of the freedom of opinion and expression.

Therefore, states face an uneasy dilemma. From one side they are obliged to take all necessary measures to protect individuals within their territory against threats and challenges (involvement in terrorist or extremist activity encouragement of suicides, racial incitement, social and other sorts of hatred, commission of crimes via internet etc.). Any of these acts infringe security and the rights of individuals and therefore undermine the security of the state. On the other hand states shall impose limitations bona fidae to avoid violation of the freedom of opinion and expression, and right to privacy.

V. Conclusion

The contemporary world is characterized by the use of cyber technologies in all areas of public life and also in international relations.

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[29] General comment No. 11: Article 20. <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CCPR/GEC/4720&Lang=en>.

[30] Report of the UN Special Rapporteur on the freedom of opinion and expression 67/357 of 7.09.2012 <https://www.itu.int/council/pd/constitution.html>.

[31] Genocide convention 1948 <http://www.hrweb.org/legal/genocide.html>

[32] Report of the Special Rapporteur to the General Assembly on hate speech and incitement to hatred 67/357 of 7.09.2012 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/501/25/PDF/N1250125.pdf?OpenElement>.

The activity of states and individuals in the cyber area may constitute a threat to international peace and security and under certain conditions may even reach the level of an armed attack that will result in the full-scale international military conflict that undoubtedly will constitute the enormous violation of the right to life. It is very important thus to be very careful when qualifying cyber-attacks as armed attacks. Cyber-attacks may only be qualified as the latter if all criteria of an armed attack are observed.

Cyber-attacks over critical infrastructure in peace-time may cause a severe threat to the military, political and economic security of the state and simultaneously may violate a broad scope of civil and economic rights of its inhabitants.

Use of cyber means as the means of warfare could only be allowed under very strict limitations. The use of autonomous drones and robots for targeted killing constitutes a clear violation of the right to life regardless of them being specifically targeted or applied as a swarm in a non-selective way. Attacks over critical infrastructure shall not include such types of critical infrastructure as installations containing dangerous forces. These attacks if they happen will constitute a grave violation of international humanitarian law. Active use of cyber infrastructure for military purposes turns it into legitimate military goals that will endanger the lives of civilians working there.

In the peacetime cyber-attacks over critical infrastructure may also constitute a threat to the political or economic security of states. When one speaks about the transfer of information via The Internet, it may only be stated that the balance between the obligation of states to exercise due diligence to guarantee security of individuals as well as their rights on one hand and freedom of opinion and expression and the right to privacy on the other, is not found yet. The exercising of the freedom of expression shall not override the limitations of art. 19 and 20 of the ICCPR. Simultaneously human rights shall not be arbitrary and unnecessarily limited under the slogan of being for the common good.

Impact of the Annexation of the Crimea on Security Policies in Europe

DARINA DVORNICHENKO AND VADYM BARSKYY

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I. Introduction

Five years have passed since the Russian Federation annexed the Crimea. The annexation of the Crimea by the Kremlin turned out to be the most serious breach of European borders since the Second World War. Russia violated the fundamental principles of international law, its international obligations and bilateral agreements with Ukraine. The annexation has

sharply increased instability of the European security environment, created new dividing lines and greatly enhanced the risk of the destruction of the existing world order. A proper understanding of how the annexation of the Crimea affected Europe's policy and shaped its response can provide essential insights to measure the effectiveness of its approach to ensuring the European security.

The following paper will assess how the annexation of the Crimea affected the EU and its member-states policy. By taking an interdisciplinary and critical look at the impact the annexation of the Crimea made on Europe, the paper aims to provide answers to the following questions:

1) How coherent and effective is the non-recognition and sanction-based policy of the EU?

2) How has the annexation of the Crimea impacted the narrative and political decisions in security field adopted by Russia understanders and Russia opponents among the EU member states?

3) How do the EU response and the EU member states' position contribute to the European security?

At the end of the paper particular recommendations on how to ensure Europe's own political, energetic and informational security are presented.

II. The Annexation of the Crimea: Background and Implications

The strategic importance of the Crimean peninsula was realized thousands of years ago. Its geopolitical location almost in the centre of the Black Sea between the Caucasus and Southern Europe as well as the wealth of natural resources makes its strategically important. A significant portion of Russia's navy stationed in Sevastopol and the ethnic diversity of the Crimea with the largest population of ethnic Russians within

Ukraine and a strong Muslim minority of the Crimean Tatars turned it into the most sensitive issue in Ukraine-Russia relations which could easily explode.

At different times the Crimea was owned by the Tauris, Cimmerians, Greeks, Scythians, Romans, Huns, Goths, Bulgarians, Tatars, Slavs and other peoples. Its history as part of the Russian Empire started in 1783 when Catherine the Great annexed it from the Ottoman Empire. In 1921, the Crimea became the Crimean Autonomous Soviet Socialist Republic, part of the Soviet Union. Thirty-three years later, in 1954, Nikita Khrushchev transferred the Crimea to Ukraine in a move hailed as a "noble act on behalf of the Russian people. When Ukraine held a referendum in December 1991, 54 % of the Crimean residents favoured the independence from the Soviet Union. It was a majority, but the lowest one found in Ukraine. Thus the Crimea became part of independent Ukraine with significant autonomy including its own constitution and parliament. In 1997, Ukraine and Russia signed a bilateral Treaty on Friendship, Cooperation and Partnership, which formally allowed Russia to keep its Black Sea Fleet in Sevastopol. From 1997 to 2014, the sitation in the Crimea was considered under control.

However, the second decade of the XXI century has marked a shift in Russian military mindset. A refusal to accept Western dominance alongside with a more active form of resistance has been deeply embedded in a new doctrine articulated by Chief of Russian General Staff Valery Gerasimov in his article "The Value of Science is in the Foresight". Based on the lessons of the Georgia conflict, he described a framework of the new operational concept as the role of "Non-Military Methods in the Resolution of Interstate Conflicts".[1] According to V. Gerasimov, Russia heavily relies on proxy forces, both paramilitary and cyber, supported by media institutions and companies, Spetsnaz and Cossack fighters to conduct different types of operations, like unconventional, information, psycho-

[1] Gerasimov Valery, The value of Science is in the Foresight, Военно-Промышленный Курьер of 26 February 2013 <www.vpk-news.ru/articles/14632>.

logical and cyber operations, as well as security forces assistance and strategic communication. Due to the fact that the proxy forces consist of a mixture of Russians and ethnic Russians abroad, Russia not only exploits social conditions, but also cultural and linguistic factors in former Soviet states and at home to create proxy forces.[2] The open use of forces often under the guise of peacekeeping and crisis regulation is resorted to only at a certain phase, primarily for the achievement of final success in the conflict. Altogether, the new generation warfare concept by V. Gerasimov has six phases which proved to be a successful approach in taking over the Crimea from Ukraine.

Main part in the Russian operation was the media campaign to gain support in the Crimea and Russia and to isolate the government of Ukraine. Television and the Internet were the dominant news media in Ukraine. The Russian information campaign started with the comparison of the Ukrainian government and their Western allies to Nazis, gays, Jews and other groups of people that Russia claimed were part of the conspiracy.[3] Russia showed swastikas on billboards and in the media to compare the government to Nazi Germany. Russian media used past events to emphasize how aggressive NATO and the West were and how these powers violated agreements on NATO expansion restrictions into Eastern Europe.

The annexation of the Crimea has serious implications for Ukraine and Europe in all areas. In the economic area, the annexation of the Crimea and further Russia's military actions in Donbas led to the displacement of 1.5 million registered Ukrainians, who have become a challenge not only for Ukrainian economy but also for the neighbouring EU member-states. In the energetic area, the annexation of the Crimea led to the breakdown of energetic ties between Ukraine and Russia which might pose a

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[2] Selhorst Tony, Russia's Perception Warfare, Militaire Spectator of 22 April 2016. <https://www.militairespectator.nl/thema/strategie-operaties/artikel/russias-perception-warfare>.

[3] Yuhas Alan, Russian Propaganda over the Crimea and the Ukraine: How Does it Work?, The Guardian of 17 March 2014. <https://www.theguardian.com/world/2014/mar/17/the The Crimea-crisis-russia-propaganda-media>.

challenge to the energy security of the other European states benefitting from transit routes via Ukraine's and their territory. In the military area, Russia can now block the Black Sea Straits in the South-West strategic direction, using forces located on the Crimean peninsula. In the geopolitical area, the annexation of the Crimea demonstrated that European states security might be also challenged by Russia. Although the Crimean scenario is unlikely to be repeated in other European countries, Russia's efforts to interfere in their internal affairs (especially in those countries which either have Russian-speaking population or common energetic and economic interests) via disinformation campaigns with the purpose to destabilize the situation and challenge the unity of the EU will be more unwearying. That actualizes the search for a proper response of the EU to the Kremlin's actions against Ukraine's territorial integrity.

III. The EU's Response to the Annexation of the Crimea

1. EU Non-recognition policy

The EU has demonstrated its strong commitment to support Ukraine since 2014. The EU conclusions, high-level statements and declarations have been used to address actions against Ukraine's territorial integrity, human rights violations and the infringement of navigational rights in Ukraine's territorial waters.

The situation in the Crimea was first addressed by the EU during the extraordinary meeting of the EU Heads of State on 6March, 2014. In the joint statement, the EU leaders condemned Russia's unprovoked violation of the Ukrainian sovereignty and territorial integrity and called on Russia to immediately withdraw its armed forces and allow immediate access for international monitors.[4]

[4] Extraordinary meeting of EU Heads of State or Government on Ukraine of 6 March 2014, <https://www.consilium.europa.eu/en/meetings/european-council/2014/03/06/>.

The violation of Ukrainian sovereignty and territorial integrity has become the key message in the numerous EU conclusions, high-level statements and declarations especially when the attention of the international community shifted from the Crimea to Eastern Ukraine. However, since the outbreak of war in eastern Ukraine, the EU has been rather vocal in its support of any negotiating format in regard to the conflict in Donbas, whereas the issue of the Crimea remains non-negotiable. In this regard there are serious doubts as to the consistency of the EU's position towards the annexed peninsula as "the EU insists on dividing the two issues, Donbas and the Crimea" and omitting "the Crimean case from the current discussions".[5]

The human rights violations have also been a topic of consistently keen interest. Since the Russian attack against the Crimea, the European Parliament has paid close attention to the situation of the Crimean Tatars. Meanwhile, the European Parliament resolutions adopted in 2014 only vaguely addressed the human rights-related activities. The rapidly developing territorial conflict overshadowed other concerns. Five years on from the illegal annexation of the Autonomous Republic of the Crimea and the city of Sevastopol by the Russian Federation, the High Representative Federica Mogherini on behalf of the EU adopted the Declaration on the Autonomous Republic of the Crimea and the city of Sevastopol 17 March 2019 which states that the human rights situation in the Crimean peninsula has significantly deteriorated. Residents of the peninsula face systematic restrictions of fundamental freedoms, such as freedom of expression, religion or belief and association and the right to peaceful assembly. The Declaration also confirms the grave violations of rights of the the Crimean Tatars through the shutting down of the Crimean Tatar media outlets, the banning of the activities of the Mejlis, their self-governing body, and the persecution of its leaders and members of their

[5] Ivashchenko-Stadnik Kateryna, Petrov Roman, Rieker Pernille, Russo Alessandra. Implementation of the EU's crisis response in Ukraine. 2018. <http://www.eunpack.eu/sites/default/files/publications/2018-01-31%20D6.3%20Working%20paper%20on%20implementation%20of%20EU%20crisis%20response%20in%20Ukraine.pdf>.

community.[6] Unfortunately, the Declaration contains nothing but the EU expectations that Russia will reverse its decisions and end the pressure on the Crimean Tatar community.

The infringement of navigational rights in Ukraine's territorial waters has also appeared to one of the topics in the declarations and resolutions initiated by the EU. On 24 October 2018, the European Parliament adopted the Resolution which expressed its very serious concern about the very volatile security situation in the Sea of Azov and condemned the excessive stopping and inspection of commercial vessels, including both Ukrainian ships and those with flags of third-party states.[7] The resolution had no effect on further Russia actions in the Sea of Azov and did not stop Kremlin from using of force a month later when Russian forces fired on and seized two Ukrainian gunboats and one tug after the Ukrainian vessels tried to pass under the Kerch Strait Bridge.

In December 2018, following the events of 25 November, the European Parliament adopted the resolution on the implementation of the EU Association Agreement with Ukraine. It strongly condemned the deliberate act of aggression by the Russian Federation against Ukraine on 25 November 2018 in the Kerch Strait and called on the EU and its Member States to close access to EU ports for Russian ships coming from the Sea of Azov if Russia did not re-establish freedom of navigation through the Kerch Strait and in the Sea of Azov.[8]

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[6] Declaration by the High Representative Federica Mogherini on behalf of the EU on the Autonomous Republic of Crimea and the city of Sevastopol of 17March 2019, <https://www.consilium.europa.eu/en/press/press-releases/2019/03/17/declaration-by-the-high-representative-federica-mogherini-on-behalf-of-the-eu-on-the-autonomous-republic-of-crimea-and-the-city-of-sevastopol/>.

[7] European Parliament resolution {2018/2870(RSP)) on the situation in the Sea of Azov of 24 October 2018, <http://www.europarl.europa.eu/doceo/document/RC-8-2018-0493_EN.html>.

[8] European Parliament resolution (2017/2283(INI)) on the implementation of the EU Association Agreement with Ukraine of 12 December 2018, <http://www.europarl.europa.eu/doceo/document/TA-8-2018-0518_EN.html?redirect>.

On 17 June 2019, the Council adopted the Conclusions on the Black Sea confirming again that the EU policy decisions and its non-recognition policy on the illegal annexation of the Crimea are fundamental to the EU's approach to regional cooperation in the Black Sea area.[9] However, the document remains silent on what exactly the EU is willing to do about Russia's unlawful actions in the Kerch Strait.

2. EU Sanctions Policy

The non-recognition policy is rather seldom introduced in isolation from other foreign policy instruments such as restrictive measures. Since March 2014, the EU has progressively imposed restrictive measures against Russia in response to the annexation of the Crimea. The first set of restrictive measures was imposed against 21 Russian and Ukrainian officials responsible for actions threatening Ukraine's territorial integrity. The same year the EU adopted a package of targeted economic sanctions which included a ban on imports of goods originating in the Crimea or Sevastopol unless they have Ukrainian certificates; a prohibition to invest in the Crimea, a ban to buy real estate or entities in the Crimea, finance the Crimean companies or supply related services, a ban to invest in infrastructure projects in the following sectors: transport; telecommunications; energy, exploration and production of oil, gas and mineral resources; a ban on providing tourism services in the Crimea; a ban on exporting transport, telecommunications and resources to the Crimea; a ban on providing technical assistance, brokering, construction or engineering services related to infrastructure in the Crimea.

In late November 2018, a new Crimean crisis challenged the international community. Russian coast guard ships opened fire on a group of vessels of the Ukrainian Navy in international waters as they were leaving the

[9] Council Conclusions on the EU's engagement to the Black Sea regional cooperation of 17 June 2019, <https://www.consilium.europa.eu/media/39779/st10219-en19.pdf>.

Kerch Strait.[10] However, it took the EU almost 4 months to renew sanctions over actions on 15 March 2019 to add eight Russian officials to the list of those subject to restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.[11] On 20 June 2019, Council prolonged the restrictive measures introduced in response to the illegal annexation of the Crimea and Sevastopol by Russia until 23 June 2020.

However, there are particular weak spots in the sanctions regime. The EU is not expected to only condemn the party of the conflict but rather demonstrate how much pain can be tolerated. According to Paul Kalinichenko, the EU sanctions in response to the actions threatening Ukraine's territorial integrity and Russia's countersanctions have frozen negotiations and consequently have not achieved anything.[12] The sanctions have neither stopped the annexation nor restrained Russia from taking further aggressive steps.

Besides, tighter implementation is required. In 2015 and 2016, Siemens sold gas turbines to Russia, four of which were later installed in Russia-annexed the Crimea. In May 2018, the construction of Nord Stream 2, which will deliver gas to Europe from northern Russia's Yamal Peninsula, started. Vessels from several EU member states have repeatedly infringed the sanctions by docking in the Crimean ports. The sanctions remain rather soft and thus fail to destroy the relations between the EU and Russia in such areas as energy, investments and manufactured goods trade.

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[10] Ukraine urges EU to impose new sanctions on Russia over attack near Kerch Strait, UNIAN of 26 November 2018, <https://www.unian.info/politics/10351809-ukraine-urges-eu-to-impose-new-sanctions-on-russia-over-attack-near-kerch-strait.html>.

[11] Ukraine: EU responds to escalation at the Kerch Strait and the Sea of Azov, and renews sanctions over actions against Ukraine's territorial integrity of 15 March 2019, <https://www.consilium.europa.eu/en/press/press-releases/2019/03/15/ukraine-eu-responds-to-escalation-at-the-kerch-straits-and-the-azov-sea-and-renews-sanctions-over-actions-against-ukraine-s-territorial-integrity/>.

[12] KALINICHENKO PAUL, Post-Crimean Twister: Russia, the EU and the Law of Sanctions. Russian Law Journal. 2017;5(3):9-28, <https://doi.org/10.17589/2309-8678-2017-5-3-9-28>.

Last but not least, most sanctions have been imposed in regard to such violations of international law as actions against Ukraine's territorial integrity, although breaches of human rights have been present so far. The EU addresses human rights violations by adopting particular conclusions and declarations rather than deploying restrictive measures. Hopefully, after the adoption of the EU Global Human Rights Act further sanctions in response to human rights violations in the Crimea will be considered.

IV. Impact of the Annexation of the Crimea on the EU Member States

There is a clear gap in geopolitical orientations and political dynamics between those member-states that do see the security threat from annexation of the Crimea, and those who put greater weight in the role of Russia as a security provider or economic partner. However, there is still no consent among experts on the composition of both camps (Russia accusers and Russia understanders).

According to Andrey Makarychev and Stefano Braghiroli,[13] there are four groups of "Russia understanders" in Europe. The first group is pragmatic; mostly its members dominate in Germany, France, Italy, and Finland. Members of this group are associated with the economic and political interests of businesses seeking new opportunities in Russian markets. The second group includes those that have a political identity, largely based on ethnic and / or civilizational affinity with Russia. They are most common in places like Latvia and Estonia, as well as Bulgaria and Greece. The third group includes some leftist, neo-Marxist and communist parties in Western Europe, such as the left party in Germany and the Italian and French communists. They view the struggle between Russia and the West as one of two competing hegemonies. They tend to give prefer-

[13] Braghiroli Stefano, Makarychev Andrey, "Russia and its supporters in Europe: a trans-ideology a-la-carte?" Southeast European and Black Sea Studies, Volume 16, Issue 2, March 2016.

ence to the Crimean citizens in their alleged fight against "fascism". The fourth group includes the far-right parties, such as the National Front in France, Vlaams Belang in Belgium, Jobbik in Hungary, Attaka in Bulgaria, the National Democratic Party in Germany, the Northern League and Forza Nuova in Italy, the Freedom Party in Austria, the Golden Dawn in Greece and the British National Party.

According to the Kremlin Watch Report 2017,[14] there are three states that act Kremlin-friendly (Greece, Italy, Cyprus) and two governments that are using the Russian card for domestic reasons (Slovakia, Hungary). The authors of the report also specifies the group of 14 countries clearly concerned with Russian aggression but at the same time missing a leader (Estonia, Latvia, Lithuania, Poland, United Kingdom, Denmark Finland, Sweden, Netherlands, Czech Republic, Germany, Croatia, Romania, Bulgaria) .

The present study will focus on evaluating public statements and actions taken by Germany, France, Greece, Italy, Visegrad Group and Baltic States with the aim to assess the impact of annexation of the Crimea on their security policies and the level of their alignment with the official Brussels course.

1. Impact of the Annexation of the Crimea on the Security Policy of Germany

The official rhetoric of Berlin so far has been critical towards Russia's actions in Ukraine. White Paper on German Security Policy and the Future of the Bundeswehr (2016) stresses that Russia is openly calling the European peace order into question with its willingness to use force to advance its own interests and to unilaterally redraw borders guaranteed under international law, as it has done in the Crimea. This has far-

[14] Kremlin Watch Report 2017. How do European democracies react to Russian aggression? Review of shifts in strategic & policy documents of EU28 following Russian aggression against Ukraine. <https://www.europeanvalues.net/wp-content/uploads/2017/04/How-do-European-democracies-react-to-Russian-aggression.pdf>.

reaching implications for security in Europe and thus for the security of Germany.[15] Besides, Germany has been engaged in mediation efforts in cooperation with France over the situation in Ukraine. No less importantly, Germany has taken a leading role in implementing the EU sanctions against Russia.

However, the implications of Russia's unlawful actions against Ukraine's territorial integrity for Germany's security (and also European one) should be mainly assessed in the energy area. Russia is Germany's largest energy supplier. Germany imports nearly 40% of its natural gas from Russia and around a third of its oil and coal as well. Since September 2015 when Russia, Germany and a consortium of Western companies signed an agreement for the implementation of Nord Stream 2 project, it has turned into a sensitive issue as, on the one hand, it meets EU need in diversification of its routes but, on the other one, weakens the position of such transit countries as Ukraine, Poland and Slovakia. The German government has repeatedly claimed that the project should not be politicized. According to German government spokeswoman Ulrike Demmer, Nord Stream-2 is a commercial project.[16] However, to regard Nord Stream 2 as a commercial project would be to ignore its repercussions. It is obvious, that while construction is a matter for Gazprom and its European partners, it is up to Germany and the EU to address the repercussions which might be quite serious not only for Berlin's future energy security but also other European countries which will lose their staus as transit ones.

According to the Kremlin Watch Report 2017, there are two concepts for Germany's approach towards Russia – one considers Russia to be Germany's strategic partner and makes reference to Ostpolitik, the other doubts the significance and sees Russia as a state with a substantial

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[15] White Paper on German Security Policy and the Future of the Bundeswehr, 2016 <https://www.bundeswehr.de/resource/resource/MzEzNTM4MmUzMzMyM-mUzMTM1MzMyZTM2MzIzMDMwMzAzMDMwMzAzMDY5NzE3MzM1Njc2NDYyMzMyMDI-wMjAyMDIw/2016%20White%20Paper.pdf>.

[16] Germany says still sees Nord Stream 2 as primarily commercial venture, KyivPost of 19 September 2018, <https://www.kyivpost.com/ukraine-politics/reuters-spokeswoman-says-germany-still-sees-nord-stream-2-as-primarily-commercial-venture.html>.

potential for destructive action. Generally speaking, the first concept is popular amongst Social Democrats, the Left Party and Alternative for Germany; while the second amongst Merkel's Christian Democrats and the Greens. The two concepts find their supporters among ordinary citizens. Thus 60% of Germans are for closer ties between Russia and the EU.[17] However, only 13 % of Germans are not worried about Russia's military threat.[18] Obviously, German political establishment and public opinion is highly divided into those who treat Russia positively and those who regard Russia as a threat. That will also "demotivate other EU Member States from being tougher on the Russians, who will be increasingly pleased by the lack of a clear red line to their expansionist policies in the region".[19]

2. Impact of the Annexation of the Crimea on the Security Policy of France

Before the annexation of the Crimea, French diplomacy had been working at developing the political, economic, and even military relations with Russia. The sale contract of French warships, the Mistral, was the main achievement of French-Russian cooperation. However, in 2014 after the annexation of the Crimea, F. Hollande announced the suspension of the sale. In September 2015, the French National Assembly approved the cancellation of the sale of the Mistral warships, which had been negotiated

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[17] Russia and Europe: Rapprochement or Isolation. The results of a representative survey conducted by TNS Infratest Politikforschung in Germany and Russia, March 2016, <https://www.koerber-stiftung.de/fileadmin/user_upload/koerber-stiftung/mediathek/pdf/2016/Survey_Russia-in-Europe.pdf>.

[18] Simmons Katie, Stokes Bruce, Poushter Jacob, NATO Public Opinion: Wary of Russia, Leery of Action on Ukraine of 10 June 2015, <https://www.pewresearch.org/global/2015/06/10/1-nato-public-opinion-wary-of-russia-leary-of-action-on-ukraine/>.

[19] Härtel André, Germany and the crisis in Ukraine: divided over Moscow? Elcano Royal Institute, 2014, <http://www.realinstitutoelcano.org/wps/portal/rielcano_en/contenido?WCM_GLOBAL_CONTEXT=/elcano/elcano_in/zonas_in/ari24-2014-hartel-germany-ukraine-crisis-divided-over-moscow>.

directly with Russia beforehand.[20] In 2014, French president François Hollande was among the first who condemned Russia's annexation of the Crimea, declaring in a statement that France does not recognise a new status for the Crimea.[21]

Russia's actions against territorial integrity of Ukraine constituted not only a security challenge for Paris but also opened the window of opportunity for French diplomacy. In June 2014, the new Ukrainian president P. Poroshenko was invited by the French president F. Hollande to the commemoration ceremony of the 1944 Normandy landing.[22] This invitation is seen as the first attempt at getting the warring parties Ukraine and Russia together whereas France played a key role in creating contacts between Ukraine and Russia. This initiative can be considered as the main accomplishment for French diplomacy as it led to the formation of the Normandy format, a diplomatic quartet of Ukraine, Russia, Germany and France. Although Paris has managed to become a diplomatic power in Europe, there is still little effectiveness of the negotiations in the Normandy format. Besides, the issue of the Crimea has not been by the parties.

The new French President Emmanuel Macron has taken a harsher stance against Russia than his predecessors. While Macron held a cautious view of Russia throughout the Presidential campaign, his view has hardened after the election. The fact that E. Macron experienced Russian meddling during his campaign made the new president more concerned about the issue how to effectively counteract Russia's disinformation. For this purpose in January 2018, President Macron proposed an anti-fake news election law.

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[20] Mathevon Elise, Turning East? French Involvement in Ukraine, EuroMaidanPress of 28 April 2016, <http://euromaidanpress.com/2016/04/28/turning-east-french-involvement-in-ukraine/>.

[21] "Putin's Mein Kampf" - How the world reacted to Russia's annexation of the Crimea, 19 March 2014, <https://www.thejournal.ie/the The_the Crimea-in-quotes-1369486-Mar2014/>.

[22] Mathevon Elise, Turning East? French Involvement in Ukraine, EuroMaidanPress of 28 April 2016, <http://euromaidanpress.com/2016/04/28/turning-east-french-involvement-in-ukraine/>.

Five years after the annexation of the Crimea, France issued a statement which states that it does not recognize and will not recognize the illegal annexation of the Crimea, and remains firmly committed to the full restoration of the sovereignty and territorial integrity of Ukraine.[23]

Condemning all cases of discrimination based on belonging to an ethnic or religious community, France called for the release of all persons who were detained in violation of international law, as well as for preservation and protection of the historical and cultural heritage of the Crimea.

Although the new President is much tougher on Russia, the public opinion in France remains more open to Russian narratives on Ukraine. Two important political forces, the Republican Party under its presidential candidate Francois Fillon and the far-right extremist National Front and its leader Marine Le Pen, fiercely criticized the EU's sanctions policy and called for rapid normalization of relations with Russia.[24]

The series of the latest events, such as the announcement about Marine Le Pen's visit to Yalta in February 2019, publishment of the map with the Crimea as part of Russia by Agence France Presse and the visits of the members of the French Parliament to the Crimea at the event on the occasion of the fifth anniversary of the annexation of the Crimea, demonstrate the real degree of ambiguity in French society on Russia's actions against Ukraine's territorial integrity.

3. Impact of the Annexation of the Crimea on the Security Policy of Italy

Italy's internal and external policy after the annexation of the Crimea does not fit into the overall EU approach. According to the Kremlin Watch

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[23] France Issued a Statement in Connection with the Fifth Anniversary of the Annexation of the Ukrainian the Crimea, 19 March 2019, <https://qha.com.ua/en/novosti-en/france-issued-a-statement-in-connection-with-the-fifth-anniversary-of-the-annexation-of-the-ukrainian-crimea/>.

[24] Fischer Sabine, The End of European Bilateralisms: Germany, France, and Russia, Carnegie Mscow Centre of 12 December 2017, <https://carnegie.ru/commentary/74950>.

Report 2017, the "partnership" between Italy and Russia is based on the precondition that neither Russia nor Italy Italy's only real interest in Eastern neighbourhood is to avoid the most dangerous scenario of the NATO involvement in Ukraine – something that could have disastrous consequences for Italy's relations with Russia.

In 2015, the Italian Ministry of Defence issued a White Paper on International Security and Defence. A document of this strategic level was prepared for the first time in 30 years. In general, the rhetoric of the document advocates a militaristic approach to guaranteeing national security. What is interesting, Russia was not mentioned in it at all.[25] At the same time, according to Pew Global Attitudes Survey, 44% of Italian citizens believe that Russia is a threat to neighbouring countries. Italy is also a fierce opponent of the idea of supplying weapons to Ukraine, and in this issue the position of the Italian government completely coincides with the mood of voters: 65% of Italian citizens oppose such a decision, and only 22% are in favour of it.[26]

Besides, Italy has strong economic interests in trade with Russia. Not surprisingly, Italy is the most ardent opponent of the sanctions among all the EU Member States. First, it has become the first EU Member State which made lifting of sanctions against Russia part of its coalition agreement. Vice Prime Minister Matteo Salvini did not miss the opportunity to emphasize the damage of sanctions, as well as the need to lift them, having paid two visits to Moscow since he took his post in late May 2018. According to the Italy's Ministry of Economic Development, in 2018, Italy was the sixth supplier country of Russia. After 2013, Italian exports to Russia decreased by three billion euros per year. However, in 2017 there was a change: Italian exports to Russia grew by 19.3%, and investments increased from 27 to 36 billion euros. This positive trend is due to the

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[25] White Paper for International Security and Defence 2015 <http://www.difesa.it/Primo_Piano/Documents/2015/07_Luglio/White%20book.pdf>.

[26] Simmons Katie, Stokes Bruce, Poushter Jacob, NATO Public Opinion: Wary of Russia, Leery of Action on Ukraine of 10 June 2015, <https://www.pewresearch.org/global/2015/06/10/1-nato-public-opinion-wary-of-russia-leary-of-action-on-ukraine/>.

fact that, because of the need to adapt to the system of sanctions, many Italian companies began to export to countries such as Serbia or Belarus, which then sell their products to Russia.[27] In addition to this, in 2016, during the St. Petersburg forum, Italy signed agreements worth over one billion euros with Russia, and in 2017, cooperation in the power industry led to the conclusion of agreements between Enel and Rosseti on innovative solutions for high-tech electrical networks. In 2018, important agreements were concluded in the energy sector, wind energy infrastructure (between Eni and the Stavropol Territory), research (between Eni and the Russian railways, between Rosneft and the Polyclinic Institute of Turin) and technological development. Furthermore, in September 2018, during the first official visit of Prime Minister Giuseppe Conte to Moscow, 13 agreements were signed for an amount of about 1.5 billion euros.[28]

Although Italy has never adopted any official document which will recognize the actions of Russia in the Crimea as legitimate, there have been repeated statements made by the Italian officials which put Rome at odds with both Kyiv and Brussels. In 2018, the Vice Prime Minister and Minister of the Interior of Italy Matteo Salvini, in an interview with the Washington Post, called the occupation of the Crimea by the Russian Federation legitimate.[29] This approach shows ambiguity and does not benefit either European unity or Italy's credibility as a reliable international partner for Western allies.

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[27] Argano Maria Elena, European Union – Russia: a two-level relationship 2019, <https://eyes-on-europe.eu/russia-eu-eu-logos/>.

[28] Istituto Affari Internazionali Website, Le Relazioni tra Italia e Russia <https://www.iai.it/sites/default/files/pi_a_0144.pdf>.

[29] Weymouth Lally, Italy has done a lot – maybe too much, the Washington Post of 19 July 2018, <https://www.washingtonpost.com/outlook/italy-has-done-a-lot--maybe-too-much/2018/07/19/dc81a292-8acf-11e8-8aea-86e88ae760d8_story.html?%20utm_term%20=%20.fe1294276783&noredirect%20=%20on%20&utm_term=.fe50a671b4e0>.

4. Impact of the Annexation of the Crimea on the Security Policy of Greece

In the context of the Crimea annexation Greece reluctantly takes sides with the larger EU states, while simultaneously lobbying in favour of removing sanctions and renewing dialogue with Russia. Presenting the priorities of the Greek EU Council presidency for the first half of 2014, neither Eastern Partnership nor Ukraine was on the list. When the annexation of The The the Crimea took place, Foreign Minister Venizelos visited Ukraine and supported sanctions as well as expressed support for the Ukraine's territorial integrity, independence and sovereignty.[30] In the most turbulent times Greece was aligned with the European line.

The turn in Greek foreign policy took place when SYRIZA formed a government, full of Eurosceptic and pro-Russian politicians in 2015. On January 26, 2015, his first day as Prime Minister, Tsipras met with the Russian ambassador to Greece Andrey Maslov.[31] In June 2015 Greece and Russia examined the possibility of extending the Turkish Stream project to Greece through a South European pipeline, but the discussions have remained stagnant. There has even been an attempt to investigate the intentions of Russia on the prospect of a loan, while the possibility of Greece's participation in the New Development Bank is currently under examination. Before the July 2015 referendum on memorandum, Tsipras had asked Putin for a $10 billion loan so that Greece could return to drachma. In return, Russia only suggested $5 billion before the construction of the Greek branch of the Turkish Stream.[32]

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[30] Deputy Prime Minister and Foreign Minister Venizelos' presentation of the Hellenic Presidency's priorities to the European Parliament and responses to questions from MEPs. 20 January 2014, <http://www.mfa.gr/en/current-affairs/statements-speeches/deputy-prime-minister-and-foreign-minister-venizelos-presentation-of-the-hellenic-presidencys-priorities-to-the-european-parliament-andresponses-to-questions-from-meps.html>.

[31] Dempsey Judy, Alexis Tsipras and Greece's Miserable Foreign Policy. Carnegie Europe of 29 January 2015, <https://carnegieeurope.eu/strategiceurope/58864>.

[32] Papadopoulos Pavlos, Former KGB Agent, Flirting with SYRIZA, Travel to Moscow and the Loan which Was Never Given, Το Βήμα of 19 July 2015, <http://www.tovima.gr/politics/article/?aid=723482>.

In 2016, Greece signed a defence partnership treaty with Russia. The Greek government claimed it was necessary to prevent the collapse of the country's defence industry.[33] Besides, Greek vessels repeatedly violated the Ukrainian legislation and international sanctions and docked at the ports of the occupied the Crimea.[34]

Greece is among the countries that has repeatedly raised the question of unproductivity of sanctions against Russia and their negative effect for the national economy. Imposed sanctions were extremely badly perceived in Greek society. Greek farmers say the embargo has already dealt a devastating blow to the country's agricultural economy. The left-wing Greek MEP Manolis Glezos wrote a letter to President Putin pleading not to impose counter sanctions on Greek food imports to Russia.[35]

After the September re-election and the dissolution of the most radical Left faction from SYRIZA, Greece began to concentrate more on migration problems, the reunification of Cyprus, creating its own zone of influence in the Balkans. Radically pro-Russian deputies and ex-deputies, and some heads municipalities regularly visited the Crimea or Russia sponsored conferences and symposiums of radical European right and left without the further influence on country's policy or bilateral relations. With this relative moderation, the traditional stance on Greek-Russian relations came back into play, although prime-minister Tsipras continued to stress that he was to conduct innovative multidimensional diplomacy.[36]

Russia's actions in Crimea only fostered the rapprochement between Greece and Russia. It is not surprising, Russia has historically served for

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[33] Coughlin Con, Nato's united front under threat after Greece signs arms deal with Russia, The Telegraph of 8 July 2016, <https://www.telegraph.co.uk/news/0/natos-united-front-under-threat-after-greece-signs-arms-deal-wit/>.

[34] Guchakova T., Klymenko A., p 34.

[35] Greek farmers hit hard by Russian sanctions against EU produce, The Guardian of 2014, <https://www.theguardian.com/world/2014/aug/13/greece-farmers-russian-sanctions-rotten-fruit>.

[36] Koval Nadiia, Russia as an Alternative Security Provider: The Greek Perspective on The "Ukraine Crisis". IDEOLOGY AND POLITICS. 2017 (1), <https://kse.ua/wp-content/uploads/2018/10/1.6.ENG_.-Greece-Response-final.pdf>.

Athens as a counterbalance to the threat Turkey poses and the pressure exerted by such institutions as the European Commission, the European Central Bank and the International Monetary Fund. Ahens understands its own security by the capacity to diversify risks and maneuver between several security providers. This approach weakens the EU's capacity to act coherently to ensure its internal and external security.

5. Impact of the Annexation of the Crimea on the Security Policy of the Visegrad Group

The situation in Ukraine has been in the focus of the V4 Prime Ministers' attention since the very beginning. Thus in March 2014, the Prime Ministers of the Visegrad Countries adopted their statement expressing their deep concern "about the recent violation of Ukraine's territorial integrity and the fact that the Russian parliament had authorized military action on Ukrainian soil against the wishes of the Ukrainian government".[37]

Poland has been at the forefront of the European response to Russia's aggression. Unlike other Visegrad countries, condemnation of Russian actions against territorial integrity of Ukraine is seen on an all-country political scale, drawing criticism from the right, left, and centre. The annexation of the Crimea increased fears towards Russia that have always been very strong in Poland. Naturally, Poland has shown full support to sanctions against Russia and non-recognition policy. The annexation of the Crimea has also affected Poland's internal policies and its perception of Europe's security system.

Poland has been firm on abandoning Russian natural gas imports in favour of alternative import sources from Denmark and Norway. The LNG terminal focused on the imports from Qatar, Norway and the United States

[37] Statement of the Prime Ministers of the Visegrad Countries on Ukraine 2014, <http://www.visegradgroup.eu/calendar/2014/statement-of-the-prime>.

was put into operation in 2016. In 2018, Poland announced plans to revive the Baltic Pipe Project – construction of an underwater pipeline in order to pump Norwegian North Sea offshore gas.[38]

Poland has also increased its military spendings from 1,6% GDP in 2013 to 2,2% in 2015. As a part of Operation Atlantic Resolve, American soldiers have been deployed in Poland along with tanks and heavy equipment[39] serving as a response to the militarization of Kaliningrad Oblast. Since the annexation of the Crimea Polish state leadership has redoubled efforts to convince their partners and allies in the West that the enhancement of NATO Eastern flank is a very urgent need. Polish diplomacy instigated a demarche oriented toward persuading the leading NATO powers that the cheapest and easiest manner to deter potential future Russian invasion on the Transatlantic Alliance is to deploy additional troops to the most susceptible to invasion countries.[40]

However, there are certain politicians from the Visegrad countries, who are sympathetic towards the behaviour of the Russian Federation. President of the Czech Republic Milos Zeman and Hungarian Prime Minister Viktor Orban are the key political allies of the Kremlin who promote the narratives used to justify Russia's occupation of the Crimea. The recent rise of populist and extremist political forces, directly or indirectly supported by Russia, and the spread of toxic content via "alternative" pro-Russian media and social networks has also become a serious issue in Slovakia.

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[38] Miroslavov Oleg, Poland refuses LNG terminal in favor of the gas corridor with Norway, RuBaltic of 6 March 2018, <https://www.rubaltic.ru/articles/06032018-poland-refuses-lng-terminal-in-favor-of-the-gas-corridor-to-norway/>.

[39] Kremlin Watch Report 2017. How do European democracies react to Russian aggression? Review of shifts in strategic & policy documents of EU28 following Russian aggression against Ukraine. <https://www.europeanvalues.net/wp-content/uploads/2017/04/How-do-European-democracies-react-to-Russian-aggression.pdf>.

[40] Furgacz Przemysław, Poland's Military Security Policy in the Context of the Russian Ukrainian War: Change or Continuity, Ante Portas – Studia nad Bezpieczeństwem, 2017, 1(8), <http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-70e403e1-9b84-4f32-a8fb-19f7168961b6/c/AP.VIII_Furgacz.pdf>.

Fight against Russian informational influence has become a topic of regular discussions in the states of the Visegrad group. However, the political response depends above all on the political will of the ruling elites. Pro-Russian orientation of the Hungarian government causes the absence of decisions in this field.[41] Slovakia does not consider Russian influence a threat, therefore, does not securitize disinformation campaigns and does not give a priority to strategic counter-measures. Besides, a "pragmatic" approach of Slovakia's Prime Minister Fico who regards Russia as an inevitable, unavoidable partner upon which Slovakia's economic development is dependent does not contribute to take adequate steps in combatting Russia's propaganda.

The Czech and Polish governments are more active in this area. In the Czech Republic, several documents have been adopted to address the issue of Russian disinformation. The Security Strategy of the Czech Republic adopted in 2015 warns against efforts of "some states to revise the international order while using hybrid warfare including propaganda using traditional and new media, disinformation intelligence operations, cyber-attacks, political and economic pressures, and deployment of unmarked military personnel."[42]

In 2016, the National Security Audit presented particular suggestions for strengthening the resilience of the Czech Republic such as the establishment of the Centre Against Terrorism and Hybrid Threats (CTHH) within the Ministry of Interior, creation of a system of education for public officials to make them more resilient towards foreign influence, launching active media strategies for important democratic institutions or measures concerning media law.[43]

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[41] Kremlin Influence Index 2017: Joint Research Report. – Kyiv, Detector Media, 2017, <https://ms.detector.media/content/files/dm_iik_engl_pravka-compressed.pdf>.

[42] Ministry of Defence & Armed Forces of the Czech Republic, Security Strategy of the Czech Republic, 2015, <http://www.army.cz/images/id_8001_9000/8503/Security_Strategy_2015.pdf>.

[43] Government of the Czech Republic, National Security Audit, 2016, <https://www.vlada.cz/assets/media-centrum/aktualne/Audit-narodni-bezpecnosti-20161201.pdf>.

However, concerning the practical steps, there are a lot of gaps and insufficiencies. Although the existing documents describe the threat well, they are not focused enough on practical measures. The establishment of CTHH is the only recommendation which has been implemented so far.

In 2015, Poland started to draft the Doctrine of Information Security as a response to the increase in hybrid threats, propaganda, disinformation, and psychological influence operation. The Doctrine is supposed to be the key document clarifying the scope of responsibilities and the mode of cooperation and coordination between the government, private institutions, and citizens. The document is still in the drafting phase

The Concept of Defence of the Republic of Poland adopted in 2017 considers the "aggressive policy of the Russian Federation, including the use of such tools as disinformation campaigns against other countries" as one of the main threats and challenges. However, the Concept does not contain any precise developments or tasks regarding information security. Meanwhile, the same year Polish Prime Minister Beata Szydło announced the creation of a department of cyber security within the Chancellery of the Prime Minister.[44]

Taking into account the fact that cyber security management remains centralized in all Visegrad group countries and the engagement of private stakeholders has been so far underdeveloped, one can hardly expect a common approach to tackling the disinformation campaigns and Russia's aggressive foreign policy in the near future.

6. Impact of the Annexation of the Crimea on the Security Policy of the Baltic States

Since 2014 all three Baltic states have repeatedly demonstrate their support to Ukraine. All three countries share the position that the sanctions

[44] Polish PM to set up new cybersecurity department, 2017, <http://www.thenews.pl/1/9/Artykul/329562,Polish-PM-to-set-up-new-cybersecurity-department>.

against Russia in connection with the illegal annexation of the Crimea should remain in force until Russia returns to the principles of international law.

On 25 June 2019, all three Baltic states voted against the decision to give back Russia's voting rights in the Parliamentary Assembly of the Council of Europe. Besides, Latvia and Lithuania were the first European Parliaments which recognized the crimes committed by the Soviet Union against the Crimean Tatar people in 1944 as genocide.

However, Russia's annexation of the Crimea has not only made the Baltic States mobilize their support of Ukraine but also created a chance for Latvia, Lithuania and Estonia to take measures to enhance their own security and strengthen the military sector.

In 2014, the Latvian parliament added amendments to the Law on National Security as part of the efforts to update the competence of the top state officials according to which the Latvian President will be required to immediately request help from NATO in case of a military attack.[45]

In 2015, Estonia adopted a new national defence act with its focus on new challenges in the security sphere, both in peacetime and during war. It provides for the role of the prime minister and the government to be strengthened in managing the state's defence, and is intended to facilitate the decision-making process concerning emergency situations.[46]

Lithuania has also joined in the preparations for a possible hybrid war. The law on the use of arms in peacetime was drafted as a new legal solution

[45] New Law Requires Latvian President to Request Help from NATO in Case of Attack, 5 June 2014, <http://bit.ly/2bML4nC>.

[46] National Defence Act, Riigi Teataja, 2015, <http://bit.ly/2bPiaEL>.

and adopted on 16 December 2014. According to it, the country's President would be entitled to sign a decree introducing martial law if foreign military troops appear on Lithuanian territory.[47]

Russia's annexation of the Crimea has made the Baltic states think about changes in the language policy. Thus, in April 2018, Latvian President Raimonds Vējonis signed amendments to the education law that would effectively put an end to all Russian-language schooling in the country by 2021. In July 2018, a new set of amendments to the Law on Institutions of Higher Education was announced banning Russian-language education programs in private universities and colleges. Previously, this restriction concerned only state universities.[48]

In order to counter disinformation among population of Latvia and Lithuania, their governgments have also taken legal measures to ban Russian media providers. In March 2016, the Latvian authorities initiated the shutdown of Sputnik after an investigation established a "clear link" between Sputnik and Dmitry Kiselev, the Director of Russia's RT media empire who was facing targeted EU sanctions after Russia's illegal annexation of The Crimea.[49]

The events in Ukraine escalated the concerns of the Baltic states about their own security. Altogether, since Russia's annexation of the Crimea the three Baltic countries have managed to adopt a comprehensive approach to security and foreign policymaking.

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[47] Hyndle-Hussein Joanna, The Baltic states on the conflict in Ukraine, 23 January 2015 <https://www.osw.waw.pl/en/publikacje/osw-commentary/2015-01-23/baltic-states-conflict-ukraine>.

[48] Lucian Kim, A New Law In Latvia Aims To Preserve National Language By Limiting Russian In Schools, 28 October 2018, <https://www.npr.org/2018/10/28/654142363/a-new-law-in-latvia-aims-to-preserve-national-language-by-limiting-russian-in-sc>.

[49] Vilson Maili, Baltic Perspectives on the Ukraine Crisis: Europeanization in the Shadow of Insecurity. IDEOLOGY AND POLITICS of October 2017, <https://ideopol.org/wp-content/uploads/2017/10/1.3.ENG.%20Baltic%20Perspectives%20Final.pdf>.

V. Conclusion

The annexation of the Crimea by the Kremlin has become a test for the EU unity. So far the EU has managed to develop a non-recognition and sanction-based approach towards Russia's actions in the Crimea. However, there are certain doubts whether this response is really an effective means of deterrence. So far it has neither led to the return of the Crimea to Ukraine nor stopped Kremlin's further aggressive actions in the Sea of Azov. The only consideration that occupies the minds of the EU officials is how to save the face and keep on implementing ambitious energy projects in collaboration with Russia. Therefore the declarative non-recognition policy of the EU and sanctions which can be easily circumvented is the furthest the EU can reach today. That reveals a number of weaknesses and hidden reputational risks in the EU's response to the security challenges in its nearest neighbourhood.

When the member states act in the Council of the EU, they continue to follow a "coherent" line. At the same time, each state has managed to develop bilateral cooperation policies based on their historical relation with Russia. Most western and southern European countries see Russia's threat as less imminent. Terrorism and migration constitute bigger challenges to their own security. Besides, in Western and Southern European countries, we can often see a divide between national security professionals and the majority of the political class, which sometimes adopts an appeasement position towards the current Kremlin actions. Eastern Europe and Baltic states, on the other hand, are more vulnerable but feel in relative isolation as their narrative about Russia as the most direct threat to Europe's security cannot gain traction across Europe. Such difference in priorities is only beneficial for Moscow, which focuses on bilateral relations with particular EU states and actively seeks to exploit differences between them.

Time does not play in favour of Ukraine. Leaders of the European states change, some of them tend to value the economic benefits of increased trade with Russia more than the principles of international law. Besides,

since March 2014 when Russia annexed the Crimea, Europe's attention has shifted to other crises such as Syria and rise of Euroscepticism which allowed Russia to only strengthen its regime on the peninsula. There is no guarantee that in several years the European states will not reconcile with the annexation of the Crimea following the US decision to recognize the Golan heights as part of Israel.

The return of the Crimea to Ukraine seems impossible in the nearest future as there is currently no framework to discuss the future of the peninsula. Moreover, such framework is unlikely to appear before the end of Putin's rule. The latest decision to give back Russia's voting rights in the Parliamentary Assembly of the Council of Europe together with the complete absence of any changes in Russia's position (and ignoring the order of the International Tribunal for the Law of the Sea on the release of the captured Ukrainian sailors and vessels) but in return to pay budgetary contributions to the Council of Europe demonstrates Europe's willingness to turn the page of this sad chapter without drawing certain lessons necessary mainly for Europe's future security.

VI. Recommendations

The annexation of the Crimea concerns the most basic principles of Europe and therefore should be considered in a much broader context as a test of endurance for it. The challenge for the EU member states is how to secure its nearest neighbourhood and ensure Europe's own political, energetic and informational security. This task is not easy but therefore, the most important thing is to make sure that all the EU member-states follow the Brussels-based course.

Firstly, Europe should draw certain red lines in relations with Russia and make it clear that their trespassing will not be tolerated. Secondly, the European states should have a common position and vision of what should happen to have sanctions lifted. Besides, the EU member states should consider the application of additional sanctions on Russia in response to human rights violations in the Crimea and reputational sanc-

tions for others who support Putin's aggressive behaviour. Thirdly, there should be more awareness on the need to cooperate in order to counter hybrid threats and any interference in the internal affairs of the European countries.

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How Energy Dependency Becomes a Punitive Mea-sure in Foreign Policy: The Case of Israel and Gaza

ITAY FISCHHENDLER

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I. Introduction

The use of energy as a foreign policy instrument can serve different and often contrasting objectives, sometimes termed petro-carrots and petro-sticks, which respectively reward or punish countries for their behavior (Newnham 2011). Energy can be used to draw countries closer by creating a long-term perspective for improved political relations. At the same time, energy can be applied as a conflict-enhancing tool, predominantly as a means of retaliation, through "punitive" price increases and supply disruptions (Newnham 2011; Shaffer 2013).

Indeed there are many examples for the interlinkages between foreign policy and energy often used through sticks and often though carrots. For example, US foreign policy carrots toward Saudi Arabia and other Gulf countries have been providing security and political support to oppressive regimes in exchange for reliable and affordable energy trade (Glaser 2013). At the same time, foreign policy can also turn energy into an instrument for the attainment of non-energy related goals. In the 1973 Oil Shock, OPEC countries used energy as a stick to change Western countries' positions in the Israeli-Arab conflict, and the 2008–2011 Egyptian-Israeli natural gas trade was driven by the rationale that deepening economic interests would cement political relations (Simmons 2005).

If energy can be used as a "carrot" and as a "stick" by similar countries, what determines the choice of the policy option? In a world where approximately 80% of known gas and oil energy resources are state-owned (Orrtung 2009), a better understanding of the causal mechanisms and conditions which transform energy resources into political power is becoming increasingly imperative, particularly for policy-making. Such an understanding is significant for tailoring appropriate responses, which can harness energy trade into a cooperative platform and reduce a possible adverse bias towards conflict.

Although much scholarly attention had been devoted to the study of energy and foreign policy, the link to energy trade has so far been limited, confined to the Russian-German case study, and leaving much to be desired with regard to providing a consistent theoretical explanation (Victor et al .2006; Yergin 2006; Shaffer 2013). Hence, explanations of the link between the use of energy as foreign policy and its peace and conflict consequences are limited and fall short of establishing a coherent and consistent account.

In this chapter we seek empirical and theoretical contributions that address the link between energy trade and foreign policy, including the role played by non-state actors and the private sector and civil society.

The chapter first presents energy dependency as the source of being able to use energy as a foreign policy tool. It then proceeds to examine what shapes energy dependency. Following this it uses the Israeli- Palestinian case study to exemplify how dependency relations become a forging policy tool. Finally, it draws some general conclusions that can set the basis for further research.

II. Energy as a Punitive Measure: A Dependency Perspective

Underlying these questions is the issue of energy resource availability, a factor in countries' economic and political development trajectories. Energy availability shapes the nature of inter-state dependency in international energy relations and extends beyond a simple division between countries naturally endowed with energy resources and countries lacking these resources. The effects of energy dependency on economic development, domestic politics and foreign policy cut across developed and developing economies throughout the world. Energy dependency originates from two major reasons which go beyond the natural scarcity phenomenon. First, the global energy market structure is characterized by interdependency. Energy exporting countries depend on revenues from energy exportation, while importing economies depend on affordable and reliable energy supplies. Such supply and demand relations are price volatility sensitive (Mañé-Estrada 2006), with transit nations also playing an important role in making energy trade possible (Pascual 2008). Second, as energy supply often entails permanent infrastructure involving high sunk costs,[1] dependency arises from the need to ensure long-term commitments as well as stable political and market environments.

As the sine qua non of industrialization and digitalization, energy dependency becomes an important foreign policy asset in the hands of energy-

[1] Construction of permanent infrastructures such as pipeline networks and drilling platforms are significant sunk costs without which energy trade cannot take place.

rich countries. These countries can utilize energy trade and supply relations with energy-scarce countries to seek a multitude of foreign policy advantages (Kalicki and Goldwyn 2005; Pascual and Elkind 2009; Newnham 2011). Thus, energy is also an important element in setting the international balance of power. Transit countries also harness energy as a foreign policy tool, exploiting their pivotal position within the energy trade supply chain.

Reflecting differential advantages and vulnerabilities, energy dependency is intrinsic to foreign policy and international relations (Percebois 2007; Shaffer 2013; Ziegler 2013).

III. The Sources of Energy Dependency: A Demand Supply Ratio

We already know that the level of dependency between states is mainly determined by their level of demand and supply of resources. There is vast literature arguing that increasing global demand for energy makes countries more dependent on oil imports, which, in turn, increases the probability for war over the control of major oil-exporting regions (Klare 2002). Yet, it is not only the importing country that becomes dependent on energy, but the exporting country that seeks new markets. Hence the "Energy Demand and Supply Gap" variable captures both the energy shortage and energy surplus that contribute to energy dependency. The next paragraphs outline the main factors that shape this ratio.

Environmental change: One factor that can affect the demand-supply relation is environmental change. Extreme changes in temperature, including prolonged and hard winters or especially hot summers, usually lead to a sharp rise in gas, coal and electricity consumption, thus elevating the demand for energy. In addition, since hydroelectric power plants are sensitive to the volume and timing of stream flows, extreme weather has a crucial effect on them as well, possibly reducing the energy supply.

Market structure: At the domestic level, energy availability and its pricing are conditioned by the structural necessity for a natural monopoly to set up the required infrastructure for energy supply. Thus, excessive costs related to infrastructure set-up prevent the development of market competition for infrastructure. As a consequence, infrastructure is likely to be developed only by a natural monopoly, whether private or governmental. This demand and supply gap is often aggravated due to regulatory capture which occurs when government bureaucrats, regulators or public sector agencies fail to serve the collective public interest and instead serve the private sector. This capture has already been documented in relation to the marine energy regulator in Israel that has become captured by government–industry association.

Physical and spatial characteristics: Finally, the energy literature has already indicated that the physical and spatial characteristics of countries have a profound effect on the demand and supply ratio. For example, regional energy grids, which can offset demand and supply, require economies of scale. In contrast, countries surrounded by sea and having no political relations with adjacent countries are considered energy islands. These countries find it harder to address a gap between demand and supply.

Adaptive Capacity: A country's level of adaptive capacity plays a crucial role in determining whether dependency is formed. Adaptive capacity is usually defined as the ability or potential of a system to respond successfully to variability and change and to reduce vulnerability. The forces that influence the ability of the system to adapt are the drivers or determinants of adaptive capacity. Lack of adaptive capacity is often referred to as "second order scarcity" while "first order scarcity" relates to the lack of physical availability of resources such as energy. This implies that adaptive capacity (second order scarcity) is often the technological and institutional adaptation available that can compensate for "first order scarcity" – the scarcity of the physical resource itself.

Some determinants of adaptive capacity are mainly local while others reflect more socio-economic and political systems. Adaptive capacity is context-specific and varies from country to country and from community to community while changing over time. Although the vast majority of the literature focuses on the effects of the environment and climate change on social systems and their capability to respond to these effects by means of adaptive capacity, here we situate the role of adaptive capacity of countries in terms of how it affects the demand and supply energy ratio of a country and hence its dependency.

In energy systems, adaptive capacity implies the capability of a country to foster demand management and to diversify energy resources through alternative ones. The role of diversification and localization of energy systems, through alternative energy sources, as a means for increasing adaptive capacity and hence for reducing dependencies on the importation of fossil fuels, has already been documented (Pascual and Elkind 2009). This nexus between adaptive capacity and dependencies has underlined the motivation of scholars to call for incentives which will stimulate social innovation capacity at the expense of industrial access to natural resources.

Sunk Cost: Sunk cost is a cost that has already been incurred and thus cannot be recovered. The degree of sunk cost that energy supplier or consumer states have invested in an energy infrastructure that makes trade possible has a direct effect on the level of dependency between them. The vast majority of energy during the 20th century was transported by tankers in the global market. Direct contact between the producer and the consumer was not required, allowing flexibility and frequent changes in destination for both sides of the trade. From the beginning of the 21st century, pipelines have emerged as a major means of energy supply, especially of natural gas. Trading energy through pipelines involves high sunk costs, since it links suppliers and consumers in a long-term relationship that is difficult to end due to the nature of its hard infrastructure (Shaffer 2009).

An important element that may have an effect on the level of sunk cost a country is willing to incur is the existence of trust between the countries in bilateral relations. Indeed recent energy studies have already pointed to the role of trust in delivering sustainable energy systems and in making the right technology choices around energy. The higher the level of trust between countries, the higher the probability that these countries will be inclined to be connected with permanent energy pipelines, associated with high sunk cost. Hence we can expect that under conditions of lack of trust, countries will avoid shared energy infrastructure that is based on high sunk cost that makes them more dependent on neighboring countries (SHAFFER 2009).

The next section exemplifies the role of dependencies in the use of energy as an instrument in the Israel's and Palestine's relations

IV. Energy and Israel's Foreign Policy Towards the Palestinians: The Case of Gaza

1. From the occupation of Gaza to the first Palestinian Intifada (1967–1987)

Following the 1967 war between Israel, Jordan, Egypt, and Syria, Israel gained hold of the WB and Gaza and enacted a military regime over the occupied Palestinian territories (OPT). Through the issuance of several military ordinances, energy and other infrastructure in the OPT came under the responsibilities of the Civil Administration, a unit within the Ministry of Defense coordinating civil affairs and executing government policies.[2]

In the aftermath of the 1948 War and prior to 1967, Gaza was an occupied territory of Egypt. Nevertheless, in contrast to the Jordanian annexation of the West Bank territory, Gaza was not annexed by Egypt. This legal status implied that according to international law, legal rights prevailing prior to 1948 were not abolished. Israel Electrical Company (IEC) 's legal rights were entrusted with the Egyptian Custodian of Absentees because its British mandate franchise included the City of Gaza before 1948, and at the same time IEC was absent from the territory following the war.

During their occupation, the Egyptians expanded IEC's old electricity grid with new lines, and supplemented it with a local power plant to meet the City of Gaza's growing demand. Other towns in the Gaza Strip served their citizens using diesel generators, with electricity being produced and distributed as a municipal service.[3] Electricity tariffs in Gaza considerably exceeded those in Israel.

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[2] Established in 1981 as a sub-unit of COGAT, the Civil Administration carries out many bureaucratic activities in the OPT.

[3] KAPLAN, Electricity Tariffs According to Jerusalem Franchise in Eastern Jerusalem and other Territories, Israel Electricity Company (IEC Archives, 1967); IEC, Meeting Protocol Electricity Provision to Gaza City 23-08-1967 (IEC Archives, 1967).

Although IEC explored the possibility of regaining its franchise in Gaza immediately after the end of the 1967 War, it had no genuine economic interest in Gaza. Gaza's electricity consumption constituted a mere 0.075% of the total Israeli consumption at the time, making it a non-profitable addition to IEC's market share given the costs of needed infrastructure investments.

However, electricity provision to Gaza was a government and army interest. Both sought to establish political and military control over the territory, and therefore requested that IEC provide electricity despite its reluctance. For the government and army, having IEC as electricity supplier would provide energy security for the army and a carrot for the local population. In order to ensure energy reliability, the army ordered IEC to set up a bulk electricity connection that would serve army bases and newly established Jewish factories and connect with Gaza's electricity grid, and then be distributed to the population of the municipality.[4] The rationale guiding this policy was that equalizing the electricity tariff and providing reliable electricity were essential policy carrots in controlling the territory. Through the issuance of several military ordinances, the decision was made that Gaza Strip municipalities would be allowed to continue with their existing electricity provision, and that the IEC would connect new consumers by demand in places where electricity was not yet provided.

2. First Intifada to the Oslo Accords (1987–1993)

The first Palestinian Intifada broke out at the end 1987. Lasting from December 1987 until the Madrid Conference of 1991, the intifada was a Palestinian uprising against Israeli occupation of the Palestinian Territories. It represented a change in Israeli–Palestinian relations and a rise in local Palestinian leadership.[5]

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[4] KAPLAN, Meeting Protocol on Electricity Provision in the Gaza Strip 03-11-1967 (IEC Archives, 1967).

[5] SAYIGH, Armed Struggle and the Search for State.

In Gaza, the usage of electricity cutoffs was similar to that in the West Bank. It was limited to several hours at a time as part of military curfews. However this policy in Gaza differed with regard to Palestinian electricity debt to IEC. As the debt soared, Israel's Prime Minister, Yitzhak Rabin, instructed the IDF's Civil Administration to cover the existing Palestinian debt. This carrot was possible because of the relatively smaller share of Gaza within the total Palestinian debt to IEC. At the same time, its significance was stronger than in the WB, because the debt relief had a greater welfare effect on Palestinian consumers than lowering electricity prices did.

Hence, economic and foreign policy objectives were more aligned in Gaza then in the WB. In Gaza, because IEC sold and distributed electricity directly to the majority of individual consumers, electricity could be cut off for non-paying consumers, rather than for political purposes. It was agreed that following the debt relief, the IEC in Gaza would be able to cut electricity to consumers accumulating new debts, and army personnel would assist IEC staff, bypassing the need to impose collective punishment as was occasionally done for political reasons.[6]

3. Impact of the Oslo Accords (1993-2000)

The first Intifada gradually declined between the Madrid Conference of 1991 and the signing of the first Oslo Accords on 13 September 1993.[7] The Oslo Accords marked the beginning of the Oslo Process, based on Israel's recognition of the PLO as the representative of the Palestinian people and the PLO's recognition of the State of Israel. The peace process led to two agreements and the creation of the Palestinian Authority, which received limited self-governance over the West Bank (WB) and Gaza. The interim

[6] Katz, "Statement," IEC Board of Directors Meeting, number 939, August 5, 1993 (IEC Archives, 1993).

[7] Nasrallah, The First and Second Palestinian Intifadas.

period established by the Oslo II Accords en-route to the establishment of an independent Palestinian state ended in May 1999, without achieving its goal.[8]

A specific energy track was created as part of the Oslo I Accords negotiations. Several issues dominated the agenda. First, Israelis and Palestinians had to decide on the future of their shared electricity grid. The final issue was the future control over the production and transmission segments of the electricity chain. Israel saw electricity as a future foreign policy instrument, and wanted to control the production and transmission processes in order to preserve Palestinian dependence on Israel, even after its independence.[9]

This concept of electricity as a weapon can be seen as an attempt to hold the stick at both ends. At one end was the threat of a "hard" electricity cut off, and at the other was the control of a "soft" financial sanction. Although negotiations between Israel and the Palestinian Authority on energy resumed in the aftermath of the Oslo Accords, they were unsuccessful in bridging the differences between the parties. In the absence of agreement, the responsibility for energy provision to Gaza remained in the hands of Israel.[10]

The collapse of the energy negotiation track and ensuing uncertainty led the parties to promote various initiatives. The Palestinians interpreted the disagreement on the future status of electricity relations as an opportunity to increase their electricity independence from Israel. To that end, they put forward the idea to develop a floating electricity power plant offshore of Gaza, with excess production capacity to be sold to Israel.[11] They also promoted creating an electricity grid that would connect the

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[8] Matthews, The Israel-Palestine Conflict: Parallel Discourses (Oxon: Routledge, 2011).

[9] Amrani, Interview, June 17, 2014.

[10] Reisner, Interview.

[11] MacIsaac, "Atlantic Seaboard Industries Wins Palestine Power Deal," The Globe and Mail, May 28, 1994.; Cohen, "Statement," IEC's Committee for the Peace Process Meeting number 2, March 2, 1995 (IEC Archives, 1995).

WB and Gaza, viewing it as a sign of sovereignty.[12] Israel officially refused to allow such connection between the WB and Gaza, as this would have transformed Israel into a transit country. Israel also rejected the idea of buying Palestinian electricity and possibly developing energy dependence on Palestinian provision.[13] IEC adopted a policy of minimum investment in infrastructure, resulting in decreasing ability to serve rising Palestinian demand for electricity.[14] In 1999, British Gas discovered Gaza Marine, a natural gas reservoir of some 35 billion cubic meters, 36 kilometers offshore Gaza. As Israel and Palestine were, prior to the discovery, resource-poor economies, dependent on the import of energy resources, the Gaza Marine finding clearly added a new resource layer to existing energy relations. Given its size, Gaza Marine would not only transform Palestinian dependence on Israeli energy provision, but also allow Palestinians to export gas.[15] However, the Oslo II Agreement gives Palestinians economic rights only for the first 20 nautical miles offshore of Gaza, and Israel can furthermore restrict offshore activities for security purposes; any development of the Gaza Marine field thus would depend on Israeli consent.[16] Since elevating energy scarcity was an important motivation for Israelis and Palestinians alike, and given the failure of the Oslo Accords to motivate the parties to a permanent peace solution, a resource conflict was expected. Nevertheless, in a trust-building gesture to Yasser Arafat, Chairman of the Palestinian Authority, Ehud Barak, Israel's Prime Minister,

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[12] Hillel, Multilateral – Workshop on Electricity Grids Interconnection in the Middle East, Ministry of Foreign Affairs (IEC Archives, 1994).

[13] Cohen, "Statement," March 2, 1995; Tamir, "Statement," IEC's Committee for the Peace Process Meeting number 3, March 2, 1995 (IEC Archives, 1995).

[14] Peled, "Statement," IEC's Committee for the Peace Process Meeting number 1 February 9, 1995 (IEC Archives, 1995); Tamir, "Statement," IEC's Committee for the Peace Process Meeting number 2, March 2, 1995 (IEC Archives, 1995).

[15] World Bank, West Bank and Gaza Energy Sector Review, Report No. 39695-GZ (Washington, D.C.: World Bank, 2007); Boersma and Sachs, Gaza Marine: Natural Gas Extraction in Tumultuous Times? (Washington: Brookings, 2015).

[16] Antreasyan, "Gas Finds in the Eastern Mediterranean: Gaza, Israel, and Other Conflicts," Journal of Palestine Studies, Vol. 42, No. 3 (2013), pp. 29-47; Henderson, Natural Gas in the Palestinian Authority: The Potential of the Gaza Marine Offshore Field, Mediterranean Policy Program (Washington, D.C.: German Marshall Fund, 2014); Reisner, Interview.

bequeathed Gaza Marine to the Palestinians,[17] despite opposition of the security establishment and several domestic energy firms claiming market rights.[18]

4. Second Intifada to the Gaza Disengagement (2000–2005)

In July 2000 the United States convened a summit at Camp David in an attempt to reinvigorate the Israeli–Palestinian peace process. The Second Intifada erupted two months later, following the break of negotiations and the failure to achieve a final settlement between the parties. The new uprising could have led to massive sabotage of the transmission and electricity grid, yet the potential detrimental effects to the infrastructure servicing both Palestinians and Israelis provided a safety net from acute destruction. Nevertheless, local harm to the joint infrastructure, attacks on IEC personnel working to repair the grid, and Israeli threats to cut off supply or allow its degradation propelled IEC and the Palestinian Authority to work together to delink energy provision from politics. In 2003, IEC and the Palestinian Authority signed a Memorandum of Understanding according to which "the Parties declare that the supply of electricity and that the maintenance and flow of the supply will continue to be outside the Israeli–Palestinian Conflict".[19] This agreement shows that the "electricity weapon" carried more weight in the perceptions of both Israelis and Palestinians than it had in practice. The agreement to delink energy from the conflict was put to the test when, in 2004, Palestinian electricity debt peaked to 200 million shekels, distributed equally between Gaza

[17] Henderson, Natural Gas in the Palestinian Authority; Boersma and Sachs, Gaza Marine: Natural Gas Extraction in Tumultuous Times?.

[18] Henderson, Natural Gas in the Palestinian Authority; For an alternative account suggesting corruptive behaviour, see: Caspit Stealther: The True Story of Ehud Barak (Or Yehuda, Kinneret Zemora Bitan, 2013).

[19] Ben Aryeh, Interview, June 26, 2014.

and the WB.[20] The debt, which has been growing ever since,[21] led to a consultation between Israeli Minister of Energy Joseph Paritzky and Prime Minister Ariel Sharon, in which the latter refused to cut off the energy of non-paying customers over fear of international condemnation from the likely ensuing crisis in Palestine.[22]

The gradual decline of the Second Intifada facilitated the flow of inward foreign investment and donor money for the restoration of Palestine. Investments were made in building a new small-scale power plant in Gaza, which began operating in 2002.[23] Although the power plant reduced Palestinian dependence on Israeli electricity production, it required the importation of fuels from Israel.[24] When the new power plant failed to meet Gaza's electricity demand, the Palestinian Authority requested that Israel construct an additional high-voltage transmission line. The Israeli government, wishing to maintain supply to Gaza, decided to approve the Palestinian request despite continuation of the conflict and the growing debt.[25]

5. Disengagement until today (2005–2014)

While Israel negotiated and engaged with the Palestinian Authority in the WB, it did not recognize or legitimize Hamas; and hence bilateral relations with Gaza following its takeover by Hamas were either violent or conducted via third parties and public statements

In August 2005, Israel executed its disengagement plan from the Gaza Strip, following a decision made a year earlier to completely separate from Gaza. As part of the disengagement, Israel completely withdrew its

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[20] RAZON, "Statement," IEC Board of Directors Meeting number 1149, October 21, 2004 (IEC Archives, 2004).

[21] BEN ARYEH, Interview.

[22] RAZON, "Statement," IEC Board of Directors Meeting number 1145, September 2, 2004 (IEC Archives, 2004); Razon, Statement," October 21, 2004.

[23] RAZON, "Statement," June 20, 2002.

[24] GISHA,"Gaza Power Plant," retrieved from <http://gisha.org/gazzamap/395>.

[25] RAZON, "Statement," September 2, 2004.

troops from Gaza, removed all settlements, and unilaterally transferred civil responsibilities to the Palestinian Authority, although it retained control over Gaza's borders, airspace, and territorial waters. In a letter exchange with US President George W. Bush, Sharon committed Israel to not dismantling any electricity infrastructure existing in the Gaza Strip and to continuing Israeli electricity and fuel provision in exchange for full payment.[26]

Oddly enough, despite the disengagement and Israel's disbelief in Palestinian partnership for peace, Israel continued negotiating the possibility of purchasing gas from Gaza Marine through its franchise holder, British Gas. The negotiations ended when hostilities broke out in late 2005, with rockets being launched at Israel from Gaza.[27] In an attempt to end the bombardment, Israel threatened the Palestinian Authority that it would cut off electricity supply to Gaza,[28] a threat was made despite considerable opposition from many policy-makers in Israel.[29] Following the kidnapping of an Israeli soldier, Israel led a large-scale ground operation into Gaza and bombed its electricity power plant. Although Israel justified the attack as an act of self-defense, the consequences were devastating. The absence of electrical power caused a humanitarian crisis affecting water provision, medical care, and sanitation.[30] Fearing international political consequences, Israel enhanced its electricity provision to Gaza to compensate for the deficit created by the destruction of the power plant.[31]

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[26] Government Secretariat, Ammended Disengagement Plan, 1996 (State of Israel, Prime Minister's Office, 2004); Sharon, Letter from Prime Minister Ariel Sharon to US President George W. Bush, Online (Ministry of Foreign Affairs, 2004).

[27] Brokman, Historical Milestones with British Gas, August 17, 2006 (IEC Archives, 2006).

[28] Schiff, "Israel Threatens to Stop Electricity to Gaza," Haaretz, December 21, 2005.

[29] Ben Aryeh, Letter to David Yahav on Electricity Provision to the Gaza Strip.

[30] Li and Lein, "Act of Vengeance: Israel's Bombing of the Gaza Power Plant and its Effects," Status Report (B'tselem, 2006); Ben Aryeh, "Electricity Provision to the Gaza Strip," August 7, 2006 (IEC Archives, 2006).

[31] Ben Aryeh, Letter to David Yahav on Electricity Provision to the Gaza Strip.

In June 2007, as part of internal Palestinian conflict between the Fatah and Hamas, the latter took Gaza by force and overthrew the Palestinian Authority, leading to the de facto parting of the OPT into two separate political entities.

While Israel was constrained from reducing or cutting-off electricity, it decided in September 2007 to reduce the supply of fuel to Gaza, justifying it as a necessary step in its war against Hamas' terrorism.[32] Israel's decision to limit fuel supply was challenged in the Supreme Court, which upheld the government's right to restrict energy supply as long as supply sufficiently meets vital humanitarian needs.[33] Since then, and given Palestinian on-going cash flow difficulties, Gaza has suffered from a chronic shortage of fuel, reducing the capacity of its power plant electricity generation.[34]

V. Discussion and Conclusion

The role of energy in foreign policy seems to fall between the cracks. On the one hand energy is often perceived as the domain of physicists and engineers while on the other hand the discipline of international relations ignores the importance of energy in foreign policy in most cases. As a result, despite the numerous cases where energy has been instrumentalized for foreign policy goals, this topic seems to go under the radar of academics. Therefore, energy practitioners are often not exposed to proper training in mitigating energy conflict. In addition, it has already been established that energy trade across boundaries often faces many geopolitical bottlenecks that hinder the establishment of cost-effective energy markets (ref). The limited regional electricity grids in many places (such as Europe, South America and Africa) are one indication of the need

[32] Government Secretariat, Israel's Policy towards Gaza (Military and Civil), Decision Bet/34 (State of Israel, 2007); United Nations, Gaza's Electricity Crisis.

[33] Supreme Court of Justice, Ruling Concerning Decision of Israeli Authorities to Reduce or Limit the Supply of Fuel and Electricity to the Gaza Strip, HC 9132/07 (2007).

[34] United Nations, Gaza's Electricity Crisis.

to incorporate the political dimension into energy studies. Hence, this chapter is one of the first attempts to transcend the disciplinary boundaries of energy studies and to integrate the material/physical element of energy with its geopolitical dimension into a rigorous approach. While this contribution may appear theoretical it bears practical significance for policy makers.

The Israeli–Palestinian case study demonstrates how dependencies translating to forging policy wither in the form of sticks or carrots. These sticks or carrots exemplify a strong causal relation between foreign policy considerations and energy policy. Foreign policy shapes energy policy and makes use of it to advance non-energy related goals. The Palestinian dependency on Israel for energy, particularly electricity provision, is used as a foreign policy instrument in diverse ways. Some are used for either cooperative (carrots) or conflictive (sticks) means. These instruments include preferential pricing; integration and separation of infrastructure; financial sanctions and rewards; electricity cut-offs and supply disruption. Yet, many of these sticks are restrained by the reverse dependency of Israel on the Palestinians as Israel is often sensitive to how it is portrayed in the world.

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Cross-Border Cooperation in The Fight Against Terrorism and Organised Crime

VERENA MURSCHETZ

Table of Contents

I. Introduction

The challenges, threats, and risks for security in Europe are numerous and very diverse. They are not limited to crime, but encompass various

other areas of economic, social and environmental policy. The multi-focus approach taken by the organisers of this conference is to be applauded. From cyber security and terrorism, NATO and the European Security and Defence Union to the impact of climate change on security, many different but all the more relevant aspects are being addressed. The subject of my contribution is the area of crime, specifically the cross-border cooperation to fight terrorism and transnational organised crime. Due to the wide range of perspectives taken into account in this conference and the resulting mixed expertise of the participants, I was asked to keep my contribution more general and deliver an overview on the different forms of cooperation existing to combat serious crime in Europe.

When evaluating the maintenance of security in Europe through cooperation in criminal matters various entities come to mind, such as the EU, the Council of Europe, and the OSCE, to name some. The most extensive and comprehensive cooperation to target organised and cross-border crime exists between the Members of the European Union, as the EU has supranational legislative power regarding cooperation in criminal matters.[1] Therefore, the focus of this contribution will be on the EU's fight against organised and cross-border crime. The action taken by and within the EU is very broad and diverse. It ranges from initiatives to harmonise the substantive criminal laws of the Member States, to achieve uniform definitions of the relevant crimes such as terrorism, terrorism financing or corruption in order to prevent loopholes;[2] to legal instruments that enhance cooperation between the judicial authorities in the Member States, such as the European Arrest Warrant and the European Investigation Order,[3] and legal instruments that enhance police coopera-

[1] Art. 82 TFEU; Murschetz Verena, in: Mayer/Stöger (eds.), EUV/AEUV, Art. 82 AEUV, para 1 f.

[2] Art. 83 TFEU; see EUV/AEUV-Murschetz, Art. 83 AEUV, para 1; Directive (EU) 2017/54 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and Council Decision 2005/671/JHA, OJ L 88 of 31 March 2017, 6; Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198 of 28 July 2017, 29.

[3] Art 82 TFEU; Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States, OJ L 190 of 18 July 2002, 1; Directive (EU) 2014/41 regarding the European Investigation Order in criminal matters, OJ L 130 of 1 May 2014, 1.

tion, such as the legal framework for Joint Investigation Teams. Furthermore, the EU has established a multitude of specialised agencies, which play a crucial role in supporting judicial and police cooperation, such as Eurojust, Europol, CEPOL, Frontex, as well as networks such as the European Judicial Network. Last but not least a prosecuting body on the EU level, the European Public Prosecutor (EPPO), is being established.[4] This paper will commence with a short evaluation of the threats posed by serious crime and then focus on the legal frameworks for judicial and police cooperation as well as the EU agencies and networks established to support these forms of cooperation.

II. Threats to Security by Terrorism and Transnational Organised Crime

The present danger posed by terrorism does not need to be demonstrated, as it is evident. The attacks are unpredictable events that have far reaching consequences not only for social but also for political and economic life.[5] Terrorist attacks on citizens and society are neither limited to specific areas in the world nor to specific groups of perpetrators or victims. They are carried out by different groups for different reasons with networks operating all over the world. Transnational organised crime also has a massive economic and political impact and happens not only in states that have historically been known for this specific problem, but throughout Europe. The increased digitalisation and mobility of the population has facilitated serious crime. Especially within the EU the abolition of the internal borders has led to the free movement of workers, goods, services and capital to an easier movement of criminals. The EU Commission estimated, when it announced the establishment of the European Public Prosecutor, that every year at least 50 billion euro of

[4] Art. 85 TFEU; Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283 of 31 October 2017, 1.

[5] Duquet Sanderijn/Wouters Jan, Coping with Unpredicability, eucrim 2015 Vol. 1, pp. 15-18, p. 15.

revenue from VAT are lost on national budgets all over Europe through cross-border fraud. According to the Commission transnational organised crime is making billions in profit every year by circumventing national rules and escaping criminal prosecution.[6] The criminal structures facilitating the success of such crimes take advantage of the fact that they operate in different states without borders but different laws, different police and prosecution capacities, if there is no cooperation between those capacities. Therefore, cross-border cooperation in criminal matters is crucial. As cross-border cooperation infringes fundamental rights of the individuals involved, it has to be accompanied by sufficient safeguards protecting these rights.

III. Efforts to Combat Terrorism and Transnational Organised Crime Through the EU

1. Judicial cooperation

a. Legal instruments

i. Introduction

Especially since the effectuation of Schengen, the Union's main focus has been the facilitation of a closer cooperation between the judicial authorities of the Member States in criminal matters. The European Union today understands itself as an Area of Freedom, Security and Justice (AFSJ) and to implement and maintain this area many security related measures facilitating judicial cooperation have been drafted. All of them are based on the principle of mutual recognition. The most notable and prominent measures of judicial cooperation are the pre-Lisbon Framework Decision on the European Arrest warrant and the post-Lisbon Directive on the

[6] EU Commission Press Release on the establishment of the European Public Prosecutor's Office from 8 June 2017.

European Investigation Order.[7] The European Arrest Warrant was the first and most striking example of the principle of mutual recognition put into practice.[8]

Mutual recognition requires one Member State to recognise and enforce judicial decisions by another Member state on the understanding that, while legal systems may differ, the results reached by all EU judicial authorities should be accepted as equivalent. The principle of mutual recognition, the so called "cornerstone" [9] of judicial cooperation between Member States, had not been created to facilitate cooperation in criminal matters but had originally been developed to facilitate the single market through enhancing the fundamental freedoms by limiting the Member States' power to interfere. Therefore, in the EU's single internal market the individual is mostly the subject of free movement rights claimed in national courts against State authority. The individual in the AFSJ on the other hand is the object of the free movement of state authority arranged between the states.[10] The principal of mutual recognition in criminal matters enhances the free movement of criminal investigations, prosecutions and sentences across the Union and, therefore, ensures the security aspect of the AFSJ. In fact, for a long time, the EU's legislation focused on security related measures only.[11] At that time the freedom aspect of

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[7] OJ L 190 of 18 July 2002, 1; OJ L 130 of 1 May 2014, 1.

[8] OJ L 190 of 18 July 2002, 1; concerning its implementation into Austrian Law, see MURSCHETZ VERENA, Die Übergabe eigener Staatsbürger nach dem Rahmenbeschluss über den Europäischen Haftbefehl und dem EU-JZG, Newsletter Menschenrechte 2016 Vol. 3, p. 163.

[9] Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para 33.

[10] PEERS STEVE, Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong? Common Market Law Review 2004 Vol. 41, pp. 5-36, p. 24.

[11] MURSCHETZ VERENA, European Police Cooperation in the Future Legal Framework of the European Union, in: Fijnaut/Ouwerkerk (eds.), The Future of Police and Judicial Cooperation in the EU, Leiden 2010, pp. 109-129, pp. 118 f; Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, OJ L 76 of 22 March 2005, 16; Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, OJ L 196 of 2 August 2003, 45; Council Framework Decision 2008/978/JHA on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30 December 2008, 72 and many more.

the AFSJ had been understood as a negative term, defined as the absence of threats from crime, which again is closely connected to the notion of security. The positive understanding of freedom on the other hand, granting the individual procedural safeguards, fundamental rights, legal protection and remedies, an EU-wide defence mechanism, had not been realised for a long time, even though such protections are particularly essential in cases where the individual is the subject of judicial cooperation in criminal enforcement measures.[12] This security-focus has shifted at least to some extent in the last years and has led to the establishment of minimum standards regarding the right to an interpreter, access to a lawyer, legal aid, and more.[13]

ii. European Arrest Warrant

The European Arrest Warrant (EAW) was the first legislative act based on the principle of mutual recognition in the field of cooperation in criminal matters.[14] As the name suggests, it deals with the arrest and transfer of a person to conduct a criminal prosecution or execute a custodial sentence or detention order. Outside the legal framework of the EAW, arrest and surrender are facilitated by the law of extradition. The EAW provides a simplified and much speedier system of surrender compared to the traditional extradition regime which it replaced within the EU and which still exists in the relation with third countries: According to the legal framework of the EAW the judicial authority in one Member State "issues" an EAW and based on the principle of mutual recognition the

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[12] Art. 6 Vienna Action Plan: Freedom must also be complemented by the full range of fundamental human rights; SCHÜNEMANN BERND, Bürgerrechte ernst nehmen bei der Europäisierung des Strafverfahrens! Strafverteidiger 2003, pp. 116-122, p. 119; SCHÜNEMANN BERND, Europäischer Haftbefehl und EU-Verfassungsentwurf auf schiefer Ebene, Zeitschrift für Rechtspolitik 2003, pp. 185-189, p. 187; LÖÖF ROBIN, Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU, European Law Journal 2006 Vol. 12, pp. 421-430, p. 423.

[13] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280 of 26 October 2010, 1; Direcitve 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297 of 4 November 2016, 1.

[14] OJ L 190, 18 July 2002, 1.

judicial authority in the other Member State recognises and "executes" the warrant by arresting and surrendering the person. The decisions on the warrant are made by judicial authorities alone, with no political considerations involved. Traditional extradition on the other hand requires the final decision on the surrender to be a political one, which of course prolongs the decision-making period significantly. This political level has been completely removed in the EAW scheme, as the inclusion of political considerations within the EU's association of states was considered not only superfluous but also improper.[15] Apart from that, another central principle of traditional extradition law, which can result in the denial of the extradition request, has been partially removed in the EAW scheme: Traditional extradition requires "double criminality", which means that the conduct, the request for extradition is based on, must be criminal in both states, the requesting and the requested country.[16] This double criminality requirement has been removed regarding a list of 32 "categories" of offences, including terrorism, money laundering, corruption, drug and weapons trafficking etc.[17] In those cases, it is irrelevant if the specific act also constitutes an offence in the executing country, which is the country that is supposed to arrest and transfer the suspect. The list of 32 offences gives rise to surrender without verification of double criminality. If the issuing judge ticks the box labelled for instance "terrorism" in the EAW, the executing judge should not establish if the act would also constitute an offence under national law.[18] The main factor responsible for the acceleration of the surrender-process, besides the removal of the political decision, was the introduction of very strict time limits,[19]

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[15] ROHLFF DANIEL, Der Europäische Haftbefehl, 1. edn., Frankfurt 2003, p. 41.

[16] For a discussion of the double criminality requirement in extradition law, see MURSCHETZ VERENA, Auslieferung und Europäischer Haftbefehl, 1. edn., Wien 2007, pp. 118 ff.

[17] Critical with regard to this limitation, see MURSCHETZ (footnote 16), pp. 316 ff.

[18] Some limits exist though and have to be observed: if the characterization of the conduct as a so called „list-offence" seems improper, the executing judge must require a clarification from the issuing judge. If the clarification is not sufficient to remove all doubt, the executing judge should decline the execution of the warrant, see MURSCHETZ (footnote 16), p. 320.

[19] Art. 17 FD EAW: The country where the person is arrested has to take a final decision on the execution of the European arrest warrant within 60 days after the arrest of the person. If the person consents to the surrender, the surrender decision must be taken within 10 days. The

within which a member state must take the decision on the execution of the EAW, and also within which the person requested actually has to be surrendered. The EAW-scheme does not require an automatic surrender, though. It does not amount to automatic mutual recognition of the other judge's decision, but the grounds for refusing the execution of an EAW are very limited, much more limited than in traditional extradition law. For instance, the continental European principle of non-extradition of nationals does not apply in the EAW-scheme.[20] Also the framework decision does not expressly foresee a proportionality check or a ground for refusal on the basis of fundamental rights violations, even though both are necessary limitations prescribed by the Charter of Fundamental Rights (CFR):[21] As the CFR is part of primary law, the interpretation of the EAW, which is secondary law, has to be consistent with the fundamental rights requirements set out in the Charter.[22] The European Court of Justice (ECJ) has, after many decisions indicating otherwise, finally accepted a ground for refusal based on fundamental rights violations though.[23] This was an important step towards a more balanced regime of judicial cooperation in criminal matters, which respects the rule of law. In summary, the EAW facilitates the effective prosecution of criminals because it simplified and expedited the procedure for getting a hold of them and bringing them to

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person requested must be surrendered as soon as possible on a date agreed between the authorities concerned, and no later than 10 days after the final decision on the execution of the European arrest warrant.

[20] See Murschetz (footnote 16), p. 215.

[21] Charter of Fundamental Rights of the European Union 2000/C 364/01, OJ C 364 of 18 December 2000, 1.

[22] Critical with regards to both, see Murschetz (footnote 16), pp. 347 ff; Schallmoser Nina, The European Arrest Warrant and Fundamental Rights, European Journal of Crime, Criminal Law and Criminal Justice 2014 Vol. 22, pp. 135-165, p. 140.

[23] ECJ, Judgement of the Court of 5 April 2016 in the Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru, ECLI:EU:C:2016:198; Judgement of the Court of 25 July 2018 in the case C-216/18 PPU, ECLI:EU:C:2018:586; Ouwerkerk Jannemieke, Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant, European Journal of Crime, Criminal Law and Criminal Justice 2018 Vol. 26, pp. 103-109; Van der Mei Anne Pieter, The European Arrest Warrant system: Recent developments in the case law of the Court of Justice, Maastricht Journal of European and Comparative Law 2017 Vol. 24, pp. 882-904, pp. 898 ff; see also EUV/AEUV-Murschetz, Art. 82 AEUV, para 6 ff.

justice. That is also the reason why the United Kingdom wishes to continue to take advantage of the EAW after Brexit, which is not a likely scenario.[24]

iii. European Investigation Order

Besides the EAW, the other main instrument which enables judicial cross-border cooperation based on the principle of mutual recognition is the European Investigation Order (EIO).[25] It facilitates the transnational collection of evidence, which is of major importance for the prosecution of transnational (organised) crime. The EIO replaces the existing quite complicated and also fragmented legal framework for requesting and sharing evidence for criminal investigations and prosecutions.[26] The complexity of the prior normative frame was mainly due to the special nature of evidence in general, as evidence is the result of procedural activity governed by very specific rules regarding the collection and admission within one particular domestic judicial system, which is supposed to strike a balance between the necessity of intrusive measures and sufficient safeguards for fundamental rights. Transnational evidence gathering and admission mixes different standards and can therefore interfere with this balance, which in consequence bears the danger of infringing upon fundamental rights. Hence, the implementation of adequate safeguards for the protection of fundamental rights of the parties involved into the new legal framework has been a major concern in the drafting

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[24] For instance, the principle of non-extradition of nationals will pose a problem: in many continental European countries it is constitutionally required, and the exceptions drafted to implement the EAW are limited to EU-citizens.

[25] OJ L 130 of 1 May 2014, 1.

[26] Such as the Council of Europe Convention on Mutual Assistance in Criminal Matters and its Additional Protocol (ETS no. 30 of 20 April 1959 and ETS no. 99 of 17 March 1978), the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197 of 12 July 2000, 3), the Schengen Convention (OJ L 239 of 22 September 2000, 19) and the European Evidence Warrant (OJ L 350 of 30 December 2008, 72); Mangiaracina Annalisa, A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order, Utrecht Law Review 2014 Vol. 10, pp. 113-133, p. 114.

process.[27] The EIO enables judicial authorities in one EU country, the "issuing state", to request that evidence be gathered in and transferred from another EU country, the "executing state", based on the principle of mutual recognition. The EIO applies to almost all investigative measures,[28] such as searches and seizures, observation, electronic surveillance and wiretapping. According to the EIO polish prosecutors could ask their counterparts in Germany to conduct a house search or a phone interception on their behalf and the request should in general be executed. Same as the EAW the EIO contains a double criminality exception and strict time limits for the decision on the request and the enforcement of the requests to obtain evidence, in order to expedite the proceedings. It also limits the grounds for refusal to execute the request. Other than the EAW though, it expressly requires a proportionality check and contains a ground for refusal on the basis of possible fundamental rights violations.[29] Hence, the issuing judicial authority has to check if the requested investigative measure is necessary and proportionate. To avoid forum shopping the issuing authority also has to examine if the measure could have been ordered under the same conditions in a similar domestic case.[30] In general the executing authority shall recognise an EIO and execute it as if the investigative measure concerned had been ordered by

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[27] Armada Inés, The European Investigation Order and the Lack of European Standards for Gathering Evidence, New Journal of European Criminal Law 2015 Vol. 6, pp. 8-31, p. 8; Mangiaracina (footnote 26), p. 113; Allegrezza Silvia, Critical Remarks on the Green Paper on Obtaining Evidence in Criminal Matters from one Member State to another and Securing its Admissibility, Zeitschrift für Internationale Strafrechtsdogmatik 2010 Vol. 9, pp. 569-579, p. 573; Garcimartín Montero Regina, The European Investigation Order and the Respect for Fundamental Rights in Criminal Investigations, eucrim 2017 Vol. 1, pp. 45-50, pp. 45 f.

[28] Armada (footnote 27), p. 8.

[29] This major difference in human rights protection foreseen in the EAW and the EIO, the two main judicial cooperation tools based on mutual recognition, can be attributed to the stronger role of the European Parliament since the entry onto force of the Treaty of Lisbon. While it is now given the part of a co-decision maker, it only had very limited consultation rights when the EAW had been negotiated. Regarding the necessity of a fundamental rights clause, see Daniele Marcello, Evidence Gathering in the Realm of the European Investigation Order, New Journal of European Criminal Law 2015 Vol. 6, pp. 179-194, pp. 184 ff; regarding the open questions and deficiencies in the application of the clause, see Armada (footnote 27), pp. 24 ff.

[30] Art. 6 EIO-Directive.

an authority of the executing State, unless grounds for non-recognition or non-execution of the order exist, such as the lack of proportionality or human rights considerations.[31] If the investigative measure indicated in the EIO does not exist under domestic law of the executing State, or would not be available in a similar domestic case, the executing authority may use an investigative measure other than that indicated in the EIO.[32] The same applies if another investigative measures would achieve the same result by less intrusive means than the one indicated in the EIO. The issuing authority may expressly request specific procedures and formalities to be followed when carrying out the investigation measure and the executing authority shall comply with them, provided that such formalities and procedures are not contrary to the fundamental principles of the law of the executing State.[33] Open questions relate to the necessity for dual legal assistance in the issuing and executing state, as well as the necessity for transnational exclusionary rule to name some.[34] The danger also exists that the possibility of introducing foreign standards of evidence gathering might lead to lower national standards for some Member states.[35] In summary the EIO, which has entered into force in 2017, has clearly simplified and expedited the transnational collection of evidence within the EU.

iv. Other instruments facilitating cross-border cooperation in criminal matters

Of course a multitude of other instruments have also been put into effect to facilitate cross-border cooperation such as the Directive on the freez-

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[31] Art. 9 (1) EIO-Directive.

[32] This does not apply regarding a list of basic investigation measures, which should be available in all Member States, such as hearing of witnesses, experts etc and other non-coercive investigative measures: Art. 9 (2) EIO-Directive.

[33] Art. 9 (2) EIO-Directive.

[34] Criticizing the disproportionate attention paid to fundamental rights in the EIO, see Garcimartín Montero (footnote 27), p. 47; Armada (footnote 27), pp. 22 ff, 29.

[35] Garcimartín Montero (footnote 27), p. 47; see also Daniele (footnote 29), pp. 185, 189 ff.

ing and confiscation of instrumentalities and proceeds of crime,[36] which lays down common rules for Member States with regard to freezing and confiscating the proceeds from certain crimes as well as property that appears to be derived from criminal conduct, the Framework Decision on the supervision order,[37] the Framework Decision on the transfer of prisoners[38] as well as the European Criminal Records Information Exchange System (ECRIS), which facilitates the exchange of information on criminal records throughout the EU.[39] There are new initiatives regarding the cross-border access to e-evidence and many more; too many to address them all.[40]

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[36] Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127 of 29 April 2014, 39.

[37] Council Framework Decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294 of 11 November 2009, 20.

[38] Council Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327 of 5 December 2008, 27.

[39] The ECRIS establishes electronic interconnections between Member States and puts rules into place to ensure that information on convictions as contained in the criminal records system of the Member States can be exchanged through standardised electronic formats, in a uniform and speedy way, and within short legal deadlines; Counsil Decision 2009/316/JHA on the establishment of the European Criminal Records Information System (ECRIS) in application of art. 11 of Framework Decision 2009/315/JHA, OJ L 93 of 7 April 2009, 33.

[40] The proposal on e-evidence consists of two strongly interconnected proposals: the Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM (2018) 225 final of 17 April 2018, and the Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM (2018) 226 final of 17 April 2018. The draft Regulation provides new forms of judicial cooperation, the European Production Order and the European Preservation Order, which will allow EU judicial authorities to issue a mandatory order for the preservation and production of electronic evidence directly to a service provider active in the European Union or to its legal representative, regardless of the location of data. To ensure that all service providers are subject to the same obligations, the draft Directive requires them to appoint a legal representative in the European Union for the receipt of, compliance with and enforcement of decisions and orders issued by competent judicial authorities (Council of the European Union, 12133/18, COPEN 294.s), for a critical evaluation, see Tosza Stanislaw, The European Commission's Proposal on Cross-Broder Access to E-Evidence, eucrim 2018 Vol. 4, pp. 212-219, p. 212.

v. Bodies and networks aiding judicial cooperation

Besides the legal instruments introduced to facilitate judicial cross-border cooperation in criminal matters the EU has also established supporting agencies and networks. Eurojust is the EU's judicial cooperation unit.[41] It consists of the College, which is formed by mainly prosecutors seconded from each Member State. Eurojust facilitates the coordination and cooperation between national authorities in many areas such as terrorism, drug trafficking, money laundering, environmental crime and many more. It coordinates investigations and prosecutions, provides operational, technical and financial support to cross-border operations and investigations and also aids in the application of the judicial cooperation mechanisms, such as the EAW and the EIO, to name some of the functions. The European Judicial Network (EJN) on the other hand is a network of contact points in the 28 Member States who also aids in the facilitation of judicial cooperation in criminal matters, without the institutional dimension Eurojust has.[42] The national Contact Points are active intermediaries who assist with establishing direct contacts between competent authorities and by providing legal and practical information necessary to prepare an effective request for judicial cooperation or to improve judicial cooperation in general. The EJN is aimed at helping national judges and prosecutors carry out cross-border investigations and prosecutions. In general, the EJN is competent for simple, bilateral cases that require the speeding up of mutual recognition requests such as EAW, while Eurojust aids in more complex or Multi-State cases.[43]

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[41] Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA.

[42] Council Decision 2008/976/JHA on the European Judicial Network, OJ L 348 of 24 December 2008, 130.

[43] Regarding the relationship between Eurojust and the EJN, see Weyembergh Anne/Armada Inés/Brière Chloé, Competition or Cooperation? State of Play and Future Perspectives on the Relations Between Europol, Eurojust and the European Judicial Network, New Journal of European Criminal Law 2015 Vol. 6, pp. 258-287, pp. 279 ff.

2. European Public Prosecutor

Apart from the cooperation bodies and networks mentioned above, cross-border cooperation in criminal investigations and prosecutions will move to the next level with the institutionalisation of the European Public Prosecutor's Office (EPPO), which is a prosecuting body on the EU level.[44] The EPPO is expected to start operating by the end of next year or by the beginning of 2021. It will not be operating in all Member States though, as not all have agreed on the founding regulation.[45] As of now 22 Member States will be participating, with only the United Kingdom, Ireland, Denmark, Hungary, Poland and Sweden not joining. The EPPO will be an independent prosecution office of the European Union, with the competence to investigate and prosecute crimes against the EU-Budget in the Member States. The novelty is the power of the EPPO to independently carry out the operational tasks of investigating and prosecuting crimes in front of the national courts. The EPPO is not competent to prosecute all cross-border crimes, but only those crimes which affect the financial interests of the EU, such as fraud, corruption, or serious cross-border VAT fraud. However, the competence of the EPPO can be increased.[46] In fact, last year the commission launched the initiative to extend the mandate to cross-border terrorist crimes,[47] which has received support from some politicians and academics.[48]

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[44] OJ L 283 of 31 October 2017, 1.

[45] It has been established within the framework of enhanced cooperation according to Art. 86 (1) TFEU. For an evaluation of the enhanced cooperation procedure, see Weyembergh Anne, Enhanced Cooperation in Criminal Matters: Past, Present and Future, in: Kert/Lehner (eds.), Vielfalt des Strafrechts im internationalen Kontext, FS Frank Höpfel, Wien/Graz 2018, pp. 605-624, pp. 605 ff.

[46] According to Art. 86 (4) TFEU by unanimous decision of the European Council after consultation of the Commission and the Parliament, see also Di Francesco Maesa Constanza, Repercussions of the Establishment of the EPPO via Enhanced Cooperation. EPPO's Added Value and the Possibility to Extend its Competence, eucrim 2017 Vol. 3, pp. 156-160, p. 156.

[47] COM (2018) 641 final of 12 September 2018.

[48] See the many references in Giuffrida Fabio, Cross-Border Crimes and the European Public Prosecutor's Office, eucrim 2017 Vol. 3, pp. 149-156.

3. Police Cooperation

a. General remarks

Besides judicial cooperation, the fight against terrorism and organised as well as cross-border crime also requires efficient assistance and cooperation between police authorities. The European Union has already accomplished high levels of assistance and cooperation in policing, starting with the Trevi group in 1975,[49] the implementation of the Schengen acquis and parts of the Treaty of Prüm.[50] EU specialised agencies have been established to support operational cooperation between Member States' law enforcement authorities, especially through improved information gathering and exchange along with the creation of large databases, such as Europol, the European Union Agency for Law Enforcement Training (CEPOL), Frontex, the European Anti-Fraud Office (OLAF), the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), and the European Asylum Support Office (EASO). They contribute to the assessment of common security threats, help to define common priorities for operational action and promote and facilitate cross-border cooperation and prosecution.

b. Europol and CEPOL

An important step towards an increased cooperation between police forces of the Member States was the creation of Europol, today the EU agency for law enforcement cooperation.[51] It is considered the focal point for cooperation activities in the Member States regarding organized and

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[49] For an evaluation of the importance of the establishment of TREVI in 1975 for police cooperation in the EU, see Fijnaut Cyrille, The Internationalization of Criminal Investigation in Western Europe, in: Fijnaut/Hermans (eds.), Police Cooperation in Europe, Lochem 1987, pp. 32-56, pp. 37 ff.

[50] Murschetz (footnote 11), pp. 109.

[51] Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135 of 24 May 2016, 53.

serious cross-border crime, such as terrorism, fraud, drug-trafficking and many more. Europol's tasks include threat assessment, the collection, analysis and transfer of data to and from the Member States, for which it has been labelled as a mega-search engine.[52] It also coordinates actions of law enforcement agencies and can support operational actions carried out jointly with Member States' authorities. Europol has the power to request the initiation of investigation and can also take part in Joint Investigations Teams.[53] Europol is not competent though to carry out operational tasks independently in the Member States, therefore, it cannot be considered a European FBI. Europol's expertise is crucial to analysing the information collected by the national law enforcement agencies, to identifying targets and also links between them and is very important in coordinating national authorities to carry out investigations and gather the relevant evidence.

CEPOL, the European Police Academy, functions as a network in a double sense. It coordinates a network of the Member States' training institutions for law enforcement officials at leadership level and facilitates a kind of informal networking among police leaders from different EU countries. They meet at the events organised by the agency in order to establish trust, as trust is closely related to police integrity. As long as police officers have institutional trust in the integrity of other police agencies and personal trust in the police officers involved, they will be willing to share information.[54]

c. *Joint Investigation Teams*

Operational police cooperation is a crucial element of effective investigation and prosecution of serious cross-border crimes. In complex transna-

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[52] Weyembergh/Armada/Brière (footnote 43), p. 261.

[53] See Weyembergh/Armada/Brière (footnote 43), p. 272.

[54] Aden Hartmut, The Role of Trust in the Exchange of Police Information in the European Multilevel System, in: Delpeuch/Ross (eds.), Comparing the Democratic Governance of Police Intelligence. New Models of Participation and Expertise in the United States and Europe, Cheltenham/Northampton 2016, pp. 322-347, p. 322.

tional cases information needs to be exchanged quickly or concerted investigative action is required in two or more Member States.[55] For that matter the legal framework for Joint Investigation Teams (JIT) has been established.[56] A JIT is a team of law enforcement officers and judicial authorities, such as prosecutors and judges from two or more Member States, who jointly investigate cross-border and international crime in one or more Member States. It is established by a mutual agreement between those authorities for a limited time and for a specific investigation.[57] It can also be established with non-Member States. One of the benefits of setting up a JIT is the fact that it allows seconded[58] members to ask competent authorities in the participating Member States to undertake investigative measures without any formal request. The request is rather handled as if it was presented in a national case with no additional checks for grounds for refusal. Gathered information is directly available to the JIT, therefore, results can be used by all members of the team no matter where they are situated.[59] The members are entitled to be present during investigative measures unless the team leader decides on the contrary.[60] The right of seconded members of the team to themselves carry out

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[55] Spapens Toine, Joint Investigation Teams in the European Union: Art. 13 JITS and the Alternatives, European Journal of Crime, Criminal Law and Criminal Justice 2011 Vol. 19, pp. 239-260, p. 247.

[56] The EU legal framework for setting up JITs between Member States can be found in art. 13 of the 2000 Convention on Mutual Assistance as well as in the Council Framework Decision 2002/465/JHA on joint investigation teams, OJ L 162 of 20 June 2002, 1, for an explanation regarding the dual legal bases, see Murschetz (footnote 11), p. 124; Javorszki Tamas, Joint Investigation Teams as a Specific Form of Mutual Assistance, Studia Iuridica Auctoritate Universitatis Pecs Publicata 2013, pp. 47-60, p. 47. The model JIT can be found in the Council Resolution 2017/C 18/01 on a Model Agreement for setting up a Joint Investigation Team (JIT), OJ C 18 of 19 January 2017, 1.

[57] Regarding the modalities of setting up a JIT, see Rebecchi Maria Cecilia, Joint Investigation Teams: A Reachable Solution to Catch Unreachable Criminals, Queen Mary Law Journal 2016 Vol. 7, pp. 95-108, pp. 97 ff.

[58] Members of the JIT from Member States other than those in which the team operates are referred to as being "seconded" to the team.

[59] Art. 13 (7) of the Convention on Mutual Assistance; Murschetz (footnote 11), p. 124, Rijken Conny, Joint Investigation Teams: principles, practice and problems. Lessons learnt form the first efforts to establish a JIT, Utrecht Law Review 2006 Vol. 2, pp. 99-118, p. 103.

[60] Art. 13 (5) of the Convention on Mutual Assistance.

investigations on another Member State's territory is subject to national regulations and is the decision of the team leader.[61] Some Member States have included this possibility in their national law, others have excluded it in general, others limit it to non-coercive measures.[62] While the JITs had set off on a very slow start, they have grown into a widely established, very efficient and effective cooperation tool. It enables the coordination of investigations and prosecutions conducted parallel in several States and the easy collection of evidence, which is then available to all members. They can be funded by Eurojust or Europol.[63]

d. Police and Customs Cooperation Centres

Police and Customs Cooperation Centres (PCCC) are also considered successful institutions facilitating regional cross-border cooperation through information exchange and the coordination of joint operations.[64] They bring together law enforcement authorities of different Member States on one site. The EU supports the growing number of PCCCs with co-funding to exchange experience and best practices.

e. Data exchange measures introduced by the Treaty of Prüm

Additionally, the fight against cross-border crime calls for functioning data exchange between the involved countries. For that matter the Treaty of Prüm[65] had been signed by like-minded Member States outside of the

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[61] Both Member State and Seconding Member State have to approve.

[62] Rijken (footnote 59), p. 104; Rebecchi (footnote 57), pp. 100 f.

[63] In 2018 Eurojust's budget allocation for JIT's amounted to 1.5 Million, in 2015 it was 1 Million (Report on Budgetary and Financial Management Financial Year 2018).

[64] They find their legal basis in Art. 39 of the Convention implementing the Schengen agreement (OJ L 239 of 22 September 2000, 19) and additional agreements for which the Schengen Convention explicitly leaves room. Austria for instance, has co-established four PCCs since 2003, three of which are bilateral and one is trilateral: Öffentliche Sicherheit 2008 Vol. 7/8, p. 65.

[65] It was signed on May 25th 2005 by Austria, Germany, Belgium, The Netherlands, Luxemburg, France and Spain; additional signatories are Slovenia, Italy, Finland, Portugal, Bulgaria, Romania, Greece and Sweden. On the Treaty, see Hummer Waldemar, Der Vertrag von Prüm – "Schengen III"? EuR 2007 Vol. 4, pp. 417-534, p. 517; Papayannis Donatos, Die Polizeiliche Zusammenarbeit und der Vertrag von Prüm, ZEuS 2008 Vol. 2, pp. 219- 251, p. 251.

EU-legal-Framework but because of its success has been integrated into EU-aquis in 2008 by the two Prüm Decisions.[66] It not only requires the Member States to collect and store data but also authorises the automated access to national DNA and fingerprint databases through a hit/no hit system. Hit/no hit approach means that DNA profiles or fingerprints found at a crime scene in one EU Member State can be compared automatically with profiles held in the databases of other EU States. Member States also grant each other access to their vehicle registration data, which is exchanged through national platforms that are linked to the online application "EUCARIS". The Prüm framework also allows for joint patrols and other joint operations, enabling designated police or customs officers to participate in interventions on foreign territory. It also provides a legal basis for assistance in connection with mass gatherings, disasters and serious accidents (crowd and riot control) by dispatching officers.[67]

In this context it is worth mentioning that last year nine of the Contracting Parties of the Police Cooperation Convention for Southeast Europe (PCC SEE) signed a Prüm-inspired legal framework for the automated exchange of DNA, fingerprint and vehicle registration data.[68] The Police Cooperation Convention for Southeast Europe is a multilateral treaty ratified by the respective parliaments of five EU and six non-EU Member States, which serves as a legal basis for cross-border law enforcement

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[66] Council Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210 of 6 August 2008, 1; Council Decision 2008/616/JHA on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210 of 6 August 2008, 12.

[67] Art. 24 of the Treaty of Prüm. As an example for a "crowd control" event the UEFA Euro 2008 can be mentioned, where police officers from various European countries, provided with full intervention power, officially supported the national police forces of Austria and Switzerland (Art. 26).

[68] „Agreement between the Parties to the Police Cooperation Convention for Southeast Europe on the Automated Exchange of DNA Data, Dactyloscopic Data and Vehicle Registration Data" and its „Implementing Agreement", signed by Albania, Austria, Bulgaria, Hungary, Macedonia, Moldova, Montenegro, Romania and Serbia, on the occasion of the ministerial conference „Security and Migration – Promoting Partnership and Resilience" on 13 September 2018.

cooperation modelled on EU good practices, such as joint threat analysis, liaison officers, hot pursuit, witness protection, cross-border surveillance, controlled delivery, undercover investigations, Joint Investigation Teams, and mixed patrols along the state borders.

IV. Conclusion

Cross-border cooperation in the fight against terrorism and organised crime is widely established and effective within the European Union. In the last decade major achievements and improvements in police and judicial cooperation have enhanced the free movement of criminal investigations, prosecutions and sentences across the Union. What should not be forgotten are the possible downsides of this development. The transfer of information, data, evidence, and persons are repressive measures which touch upon all kinds of fundamental rights and there is always a high risk of abuse. Therefore, the safeguards to protect individual rights, data, and to guarantee equivalent standards for procedural rights need to be just as efficient and effective. The development of the legal frameworks to create an Area of Freedom, Security and Justice within the EU had, for a very long time, been solely security related, focusing on repressive measures to enable trans-border investigations and prosecutions only. This focus has changed significantly in the last years, but there is still work to be done.

Climate Security and Environmental Conflict: European Perspectives

JÜRGEN SCHEFFRAN

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Since the Industrial Revolution, the growth of human population and activity has caused dramatic changes to the planet, justifying claims that we are living in the Anthropocene. Huge amounts of fossil fuels were released and contribute to environmental pollution, global warming, and species extinction. Complex chains of effects and instability of global problems are associated with insecurity, violence and war. With the end of the Cold War and increasing globalization, the concept of security has been extended to encompass ecological dimensions.

I. Resource Scarcity, Environmental Degradation and Violent Conflict

Global environmental problems undermine the natural foundations of life and human security around the world. This includes the degradation of natural resources, climate change, threats to biodiversity or overfishing of the oceans. Natural resources are becoming scarce and their use unevenly distributed. Local and short-term changes usually have a more direct influence than global and long-term phenomena with aggre-

gate and indirect effects. They burden social systems, promote economic decline, weaken state authority and increase tension between social groups, with possible conflict effects.[1]

Resource scarcity: Population growth, increasing demand and unequal distribution affect the availability of natural resources (such as water, soil, food, energy, forests, biodiversity and raw materials). This may concern the overuse of renewable resources and environmental depletion as a sink for waste and pollution, or even the structural deterioration of the functioning and stability of ecosystems, with their services to humanity. Lack of resources can lead to economic problems, and undermine the capacity and legitimacy of governments. If human basic needs can no longer be satisfied with degrading resources, the potential for conflict tends to increase.

Resource access: Often it is not the scarcity of natural resources that drives conflict but its abundance that can lead to a resource curse. For example, the revenue from the extraction of raw materials (such as diamonds) cannot only be a major source of conflict, but can also be used to feed the drivers of conflict (weapons, soldiers, equipment) by rebel groups or private security services.

Ecological marginalization: Unequal distribution of resources contributes to underdevelopment and impoverishment. The loss of vital resources such as agricultural land leads to economic decline, weakens institutions and provokes conflicting pressures.

Environmental migration and conflict: Environmental problems and natural disasters contribute to the displacement of people. If they emigrate in large numbers, especially into ecologically fragile and conflict-affected regions, this can enhance conflict.

Other conflicts concern center-periphery conflicts between rich urban centers and impoverished peripheral areas, conflicts over ethnic differ-

[1] Scheffran Jürgen, Globaler Klimawandel und Gewaltkonflikte, in: Brzoska/Kalinowski/Matthies/Meyer (eds.), Klimawandel und Konflikte, Nomos, Baden Baden 2011, pp. 27-50.

ences, and long-distance conflicts due to transboundary linkages of risk factors such as climate change, radioactive pollutants or prices on global resource markets.

The extent to which environmental risks actually lead to conflicts depends on the societal framework, in particular conflict history, group identities, incomes, institutions, organization and equipment of conflict parties, as well as the degree to which resources can be instrumentalized for group interests. Whether a latent resource conflict becomes manifest depends on the power and interest of the actors as well as on the access and type of resource, whether is it renewable or not, close or distant, diffuse or point source. The impact of the environment on violent conflict is difficult to demonstrate and often one of several conflict factors, especially in fragile regions. Environmental problems can also lead to more cooperation, for example in agreements on shared water use. Some examples show the complex relationships between environmental change and violent conflicts:

- In the Middle East, water was not only the target of military operations but also the subject of negotiations in the peace process. Water supply and dams on large rivers (Nile, Jordan, Euphrates and Tigris) are controversial.
- In Central Asia, water shortages have created disparities between Afghanistan, Iran, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, and increased the need for regional water management. The salinization and dehydration of the Aral Sea due to the overuse of the tributaries is an ecological disaster with consequences for the economy, society and health of many people.
- The environment of Pakistan and India is affected by high population growth, soil erosion, lack of water, deforestation and loss of agricultural land. Many people migrate to the cities or areas endangered by natural disasters. There are protests and violent clashes between ethnic groups.
- In Mexico, there are conflicts among dissatisfied farm workers, which, in addition to the consequences of globalization and the unfair

distribution of land rights, are also due to the scarcity of agricultural land. One consequence is exodus to irregular settlements on the edge of large cities and the United States.

II. Climate Change as a Conflict Factor and Risk Multiplier

Global warming caused by land use change and the burning of fossil fuels is becoming a risk multiplier which imposes stress on natural resources, induces and connects environmental problems in diverse geographic areas (oceans, coasts, polar regions, and other eco-zones) from local to global levels. Climate change also threatens social systems and undermines the functioning of critical infrastructures and supply networks for health, wealth and services, as a result provoking production losses, price increases, and financial crises.[2] Increasing uncertainties and risks arise from storms, floods, droughts, and other weather extremes that manifest as natural disasters, from California forest fires to the possible evacuation of island states as a result of sea-level rise.

Related social and economic upheavals are a threat to human security and can trigger or exacerbate conflicts. In the wake of the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) in 2007, a debate on the security risks and conflicts of climate change evolved. The fifth IPCC Assessment report dedicated a chapter to the impact of climate change on human security.[3] Whether societies can cope with the impacts and constrain the risks depends on their vulnerability, which is a function of exposure, sensitivity and adaptive capacity to climate change. Adaptive capacity depends on the economic, human and social capital of a society which is influenced by access to resources, information and technology,

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[2] Scheffran Jürgen, From a Climate of Complexity to Sustainable Peace, in: Brauch/Oswald-Spring/Grin/Scheffran (eds.) Handbook on Sustainability Transition and Sustainable Peace, Springer, Berlin 2016, pp. 305-347.

[3] Intergovernmental Panel on Climate Change (IPCC) Climate Change 2014: Impacts, Adaptation, and Vulnerability, Contribution of WG II to the Fifth Assessment, Geneva 2014.

and by the stability and effectiveness of institutions. The most vulnerable are poor communities in high-risk areas and developing countries with low adaptive capacities. Societies with a strong dependence on agriculture and ecosystem services tend to be more vulnerable to climate stress. With the increasing impact of climate change, it becomes challenging to absorb the consequences, in particular for tipping elements and cascading events, including the potential loss of the Amazon rainforest, a shift in the Asian monsoon, the disintegration of the West-Antarctic ice sheet or the shutdown of the North-Atlantic circulation.[4]

In the most affected regional hot spots, global climate change and local environmental degradation can contribute to poverty and hunger; undermine human security, social living conditions and political stability; and aggravate migration movements and conflict situations.[5] Particularly critical is the situation in fragile and failing states with social fragmentation, in adequate governance and management capacities. The impact of climate change could weaken the ability to solve problems and could dissolve state structures.

Possible linkages between climate and conflict have been analyzed in a number of studies with different research designs, datasets and methods, resulting in divergent findings although there is wide agreement that climate variability and change have some influence on the risk of violent conflict. As agreed in an expert assessment, the climate has affected organized armed conflict within countries and future climate change will increase the conflict risk, but with large uncertainties and low ranking of climate as an influential conflict driver.[6] While climate variability and change are estimated to have substantially increased risk across 5% of conflicts to date (on average with large variation among experts), this is supposed to increase to 13% probability for a 2 °C warming scenario and

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[4] Steffen Will et al., Trajectories of the Earth System in the Anthropocene, PNAS 2018, 8, pp. 8252–8259.

[5] Scheffran Jürgen et al. (eds.), Climate Change, Human Security and Violent Conflict: Challenges for Societal Stability, Berlin, Springer, 2012.

[6] Mach Katharine et al., Climate as a risk factor for armed conflict, *Nature* 2019, 571: 193–197.

to 26% under 4 °C warming.[7] Four drivers were identified as particularly influential for conflict risk to date: low socioeconomic development, low capabilities of the state, intergroup inequality (e.g. ethnic differences) and the recent history of violent conflict. Causal factors most sensitive to climate are much less influential to the risk of conflict, such as economic shocks and resource dependency which are affected by climate-related hazards and their impact on agricultural productivity, food prices or long-term socioeconomic development.

III. Regional Climate Hot Spots

A synopsis of different case studies shows that there are violent conflicts, especially in regions with large population growth, low levels of development, low economic growth, a moderate level of democracy, and political instability, violence and war in the vicinity. Whether climate change leads to violent conflicts depends on political and socio-economic conditions that are influenced by globalization processes. This also applies to climate change itself, which is not an independent statistical variable. When violence and other societal problems around the world are attributed to climate change, political elites can downplay their responsibility for these issues and ignore other causes. Climate-conflict linkages play a role in climate hot spots around the world.

The African continent is strongly affected by environmental problems (lack of water and soil, erosion, desertification, deforestation), exacerbated by global warming.[8] Millions are moving to cities and neighboring countries where they can aggravate social problems and conflicts. In the Horn of Africa, different drivers of forced displacement (war, oppression, hunger, drought) have destabilized the political situation, leading to foreign interventions. The Darfur conflict was called the first climate war

[7] Ibid., p. 194.

[8] For a review see: Scheffran Jürgen/Link P. Michael/Schilling Janpeter, Climate and conflict in Africa, in: Oxford Research Encyclopedia of Climate Science,Oxford University Press, Oxford 2019.

as nomadic and peasant peoples were under pressure from expanded arid zones. The exploitation of oil resources had a direct bearing on conflict escalation as well as the failed policies of the Sudanese government which used climate change as an excuse. A major humanitarian crisis has emerged in the Lake Chad region aggravated by rainfall variability, droughts, and declining water and arable land. Climate change acts as a risk multiplier and crisis catalyzer, fueling the region's fragility and vulnerability of people, aggravating unemployment, poverty, hunger and livelihood risks, leading to tensions between farmers, pastoralists and fishers. A challenge is to address the root causes of the crisis, improve water and food supply, humanitarian assistance, prevention of violence, deradicalization and reintegration of former fighters.

Widely discussed are the linkages between climate change and the Arab Spring since 2011. The series of protests and uprisings, from Tunisia to Libya, Egypt, Syria and other countries, were multiplied by electronic media and social networks. Some studies argued that the political crisis was aggravated by weather events, like the 2010/2011 drought in China, which affected the international market price of wheat and food availability,[9] together with other factors, including oil price, bioenergy use and stock market speculations. The consequences of low income, resource imports and high spending on food contributed to political unrest in conjunction with socio-economic and political drivers specific to each country. This illustrates how in an interconnected world complex chains of events and overlapping stressors can affect international stability.

This is particularly relevant in the Syrian conflict, where a major drought has been considered as one of several factors contributing to migration and violence. In the years before the civil war, Syria suffered devastating droughts hitting the main growing areas, driving many from rural to

[9] Werrell Caitlin/Femia Francesco (Eds.) The Arab Spring and Climate Change, Center for American Progress, Stimson Center, Washington, D.C. (February 2013).

urban areas and reducing the number of people in agriculture by half.[10] This was one of many drivers leading to an escalation of this conflict, rooted in economic, social and demographic conditions, political failures of and dissatisfaction with the Assad regime as well as the US invasion in Iraq 2003, the Arab Spring, regional power rivalries and the emergence of the Islamic State. Apparently, these conflict factors were likely more significant than climate.

The Mediterranean region, including Southern Europe, the Middle East and North Africa (MENA), is a complex crisis landscape with interconnected socio-political, economic and ecological processes.[11] Global warming poses additional stress on the region where agriculture, forestry, fishery and the water-food-energy nexuses are particularly vulnerable to heatwaves, droughts and forest fires. The shrinking resource base undermines living standards and development opportunities for a growing population. Climate change interacts with the region's other challenges, such as unemployment, poverty, economic recession, dependence on agriculture and weak governance, leading to unstable political regimes, mass migration, riots and violence, particularly in vulnerable MENA countries. Multiple crises resulted in migration, from Afghanistan and Iraq to the Sahel. When these movements reached Europe across the Mediterranean and the Balkan route in 2015, the EU was unable to jointly handle this situation. In the emerging "refugee crisis", nationalism provoked tensions. Media coverage of boat people and refugees reinforced threat perceptions and the securitization of migration.

Another hot spot is South Asia and the Himalayan region which is particularly exposed to climate change. Shifting monsoon patterns, sea-level rise and melting glaciers have a considerable influence on the supply and

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[10] Kelley Colin P. et al., Climate change in the Fertile Crescent and implications of the recent Syrian drought, Proceedings of the National Academy of Science (2017),112(11), pp. 3241–3246; Selby Jan/Dahi Omar S./Fröhlich Christiane/Hulme Mike, Climate change and the Syrian civil war revisited, Political Geography (2017), 60, pp. 251-252.

[11] Scheffran Jürgen/Brauch Hans Günter, Conflicts and Security Risks of Climate Change in the Mediterranean Region, in: Goffredo/Dubinsky (eds.), The Mediterranean Sea: Its History and Present Challenges, Springer, Berlin 2014, pp. 625-640.

distribution of water, food and energy. Billions of people can be affected by destabilizing the Himalayan 'water tower', extreme weather events and sea-level affecting river systems and coastal regions across borders. The geopolitical and socio-economic implications pose significant risks and complexities, not only aggravating tensions over dwindling resources and forced displacement but also the need for cooperation among affected communities and countries.[12] With a high population density, Bangladesh is particularly vulnerable to flood risks, adding to the millions of people who already migrated from Bangladesh to neighboring areas of India and contribute to local unrest.

In the Arctic region, permafrost and sea ice melting, changing ocean currents, increasing heat absorption and the release of greenhouse gases could trigger global tipping points. On a local scale, there are significant impacts on soils and vegetation; ecosystems and biodiversity; human livelihood and natural resources. A warming polar region creates new challenges for the EU and its neighbors in the Northern hemisphere and opens new opportunities for shipping, food and energy production as well as security and conflict issues over the exploitation of fossil reserves, claims for transportation, pipelines and national borders, protests by indigenous people and civil society. The complex linkages between global and local issues in the Arctic region challenge the balance of power and potentially trigger arms races between the USA, Canada, Europe, Russia, China and Japan. On the other hand, opportunities for increased cooperation and new partnerships can arise between private and state actors for sustainable Arctic development.[13]

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[12] Scheffran Jüergen, Climate Change and Security in South Asia and the Himalaya-Region: Challenges of Conflict and Cooperation, in: Aneel/Haroon/Niazi (eds.) Sustainable Development in South Asia: Shaping the Future, Sustainable Development Policy Institute, Islamabad, 2013.

[13] Raspotnik Andreas, The European Union and the Geopolitics of the Arctic, 2018, Elgar, Cheltenham.

IV. Governance of the Climate-Security Nexus: Contexts and European Perspectives

Multiple interconnected crises continue to drive the world towards socio-ecological instabilities and crises endangering peace and the conditions for sustainable development. Conversely, violence and war stand in the way of sustainable development. Thus, the danger exists that the negative interaction of environmental destruction, underdevelopment and violence will drift the world into a self-reinforcing vicious cycle with multiple losses. Then, risk and conflict management become more important.

Interest in the climate-security nexus has increased and contributed to the "securitization" of the climate discourse, pushed by a number of think tanks and advisory panels.[14] The EU High Representative and the European Commission suggested in 2008 that, "*climate change acts as a threat multiplier, worsening existing tensions in countries and regions which are already fragile and conflict-prone*".[15] In its adaptation strategy presented in 2014, the Pentagon similarly saw climate change as a threat multiplier that combines food and water shortages, pandemic diseases, dispute over refugees and resources, and destruction by natural disasters.[16] This includes possible effects on the military which has to adapt to new tasks, changes in operational practices and supply problems and has been involved in humanitarian operations, disaster management and coastal protection.

An expert assessment of the climate-conflict literature shows that policies and investments can significantly reduce conflict risk. Experts estimated that climate-conflict risk can be reduced with a 67% probability

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[14] Hardt Judith N., Environmental Security in the Anthropocene, Routledge, London 2018. Scheffran Jürgen & Battaglini Antonella, Climate and conflicts–The security risks of global warming, Regional Environmental Change (2011), 11 (Suppl. 1), pp. 27–39.

[15] EU, Climate Change and International Security, Paper from the High Representative and the European Commission to the European Council, Brussels, March 14, S113/08.

[16] US Department of Defense, Climate Change Adaptation Roadmap. Department of Defense, 2014, <https://www.acq.osd.mil/eie/download/CCARprint_wForeword_c.pdf>.

through investments addressing known drivers and to 57% for a 4 °C warming scenario with its more severe climate change effects.[17] Similar factors determine vulnerability to both climate change and armed conflict, and potential synergies between the reduction of conflict risk and climate adaptation. Specific measures advance sustainable development and human security, interlinked with the quality of governance. Consideration of climate could be incorporated into conflict mediation, peacekeeping operations and post-conflict aid and reconstruction efforts.

Climate change combines with a shifting political climate and security environment between Russia and the West as well as instabilities in the EU and the transformed transatlantic relationship with the Trump administration. It is widely acknowledged that global warming is a threat to human security, but it is also criticized to present it primarily as a national security threat requiring military responses. In the environmental sphere, the military can support climate policy to minimize damage, but not prevent climate change or its risks. Environmental and climate conflicts could become a self-fulfilling prophecy when fears lead to counterproductive actions, such as military countermeasures that consume resources, pollute the environment, provoke conflict and prevent peaceful solutions.

In April 2007, for the first time, the United Nations Security Council discussed the security risks of climate change at the initiative of Great Britain. Under the German Presidency, the Security Council in July 2011, led by OECD countries and small island states, expressed concern that climate change posed a threat to peace and security, but Russia, China and many G77 countries rejected a mandate of the Security Council on climate change. At the Berlin Climate and Security Conference on June 4, 2019, the German Foreign Ministry called for climate prevention and adaptation as an issue for the UN Security Council. A Call for Action suggested more risk-informed foresight and planning, enhanced capacity

[17] MACH et al. (footnote 6), p. 196.

for action and improved operational responses on climate and security in affected regions, aligned with sustainable development, security and peacebuilding in all UN programmes.[18]

A new phase of the climate-security discourse was entered with the publication of the 2015 G7 report "A New Climate for Peace" [19] and the Planetary Security Initiative (PSI) which has held several conferences and related activities since 2015:[20]

At the 3rd PSI conference in 2017 the Hague Declaration on Planetary Security suggested an institutional home for climate security and supported joint risk assessments in climate hot spots.

The EU High Representative for Foreign and Security Policy initiated a high-level event on climate and security that was held on 22 June 2018 in Brussels, to address the destabilizing effects and risks of climate change. Six points for further action were suggested to elevate the climate-security nexus to the highest political level in national, regional and multilateral fora.

In the same month, the report "Europe's responsibility to prepare" suggested the scaling of responses to climate threats across EU bodies, and to routinely include them into EU institutions at a senior level and along "traditional" security issues like terrorism and nuclear threats.

The EU Foreign/Defense Ministers in early 2019 identified climate change as a global threat and a threat multiplier, called for action in early warning and for geopolitical analysis, capabilities to respond to weather-related disasters, situational risk assessments, and resource and carbon footprint of military activities. In May 2019, a meeting of the Foreign Affairs Council addressed climate-related security issues.

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[18] See <https://berlin-climate-security-conference.de>.

[19] Rüttinger Lukas et al., A New Climate for Peace. adelphi, International Alert, Woodrow Wilson International Center for Scholars, European Union Institute for Security Studies.

[20] See the PSD website: <https://www.planetarysecurityinitiative.org>.

The EU can support economic and social capabilities to mitigate impacts and strengthen long-term adaptation to minimize outbreaks of violence and conflict. In many regions there is a lack of cooperation, and a number of dialogues coexist with little interaction, e.g. at the Euromed, NATO and OSCE levels. The new challenges need to be addressed in a multilateral and cooperative way, including policies and institutions on climate impacts, adaptation and mitigation, and in particular in energy security based on renewables. Whether climate stress triggers cycles of risk and violence or rather favors a transition towards cooperation, resilience and sustainability depends on human and societal responses.

The challenge is to anticipate and avoid risky pathways by counteracting forces that slow down and change course towards a more sustainable, peaceful and viable world. Integrative and interdisciplinary knowledge help to avoid dangerous pathways and interventions. Concepts of anticipative and adaptive governance strategies focus on cooperation and conflict resolution, reduce vulnerability to environmental and climate change, and strengthen adaptation and resilience.[21] The question is how to make the transition from conflicting fossil fuels to a more peaceful and sustainable low-carbon energy supply, without opening up new environmental pressures and areas of conflict, such as land-use conflicts in the introduction of renewable energy. This requires a comprehensive package of measures aimed at saving energy, increasing efficiency, promoting sustainable renewable energies, adhering to natural and social guidelines, equity and cooperation, dialogue and participation. Instead of promoting a "clash of civilizations", a "culture of peace" is needed that further develops the instruments of sustainable peacekeeping and environmental peacebuilding.

A positive linkage between sustainability, development and peace requires common investments and institutions between the Global North and the Global South to reduce the economic gap and unfair distribution

[21] Brauch Hans Günter et al. (eds.), Handbook of Sustainability Transitions and Sustainable Peace, Springer: Berlin 2016.

in the world. This requires appropriate governance structures, institutions and conflict resolution mechanisms, within the UN Framework Convention on Climate Change and the Paris Treaty. One prerequisite is that the basic needs for all people are guaranteed and the material basis of peace is secured.

Combating Cybercrime: Challenges and Strategies on the International and EU Level

TOBIAS BAUMGARTNER

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I. Introduction

This article provides an overview of legislative measures to combat increasing cybercrime. Particular challenges in the fight against cybercrime arise from the cross-border nature of these activities. A uniform, globally recognised legal framework does not yet exist. After all, the Budapest Convention of the Council of Europe, which currently has 63 members, has given important impetus to the standardisation of the criminalisation of various Internet offences and to their prosecution.

II. Cybercrime as a Growing Challenge

The fight against cybercrime poses a particular challenge. Increasing connectivity is creating more and more new targets. New forms of criminality often have a cross-border nature. And due to the technology involved, criminal prosecution requires new instruments and knowledge.

1. Connectivity Revolution

Since the breakthrough of the Internet as a mass medium for professional and private purposes, we have experienced a connectivity revolution. Various trends have led to cybercrime as a mass phenomenon[1] with immense damages:[2] The number of Internet users is rapidly growing.[3] According to estimates by the International Telecommunications Union (ITU), more than half of the world's population already has access to the Internet and the number of users is growing. Meanwhile, the use of the Internet covers almost all areas of business and private life and generates

[1] United Nations Office on Drugs and Crime (UNODC), Comprehensive Study on Cybercrime, Chapter one, <https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf>.

[2] US Federal Bureau of Investigations (FBI) Internet Crime Complaint Center, Internet Crime Report 2018, available at: <https://pdf.ic3.gov/2018_IC3Report.pdf>.

[3] Federal Office of Communications OFCOM, Internet of Things, <https://www.bakom.admin.ch/bakom/en/homepage/digital-switzerland-and-internet/internet/internet-of-things.html>.

data which documents all of our activities. The consequences are new vulnerabilities and targets for criminals. Thus, new forms of crime such as the spread of hate speech and fake news, identity theft and cyberbullying could become mass phenomena.

The use of cloud solutions for various digital applications is growing: Cloud solutions describe external storage units for mass data which are managed by third parties. Cloud solutions enable access to data via the internet from everywhere and prevent data loss due to malfunctioning of a computer or digital device. Several business processes rely on clouds, even if they are located overseas. Examples are Dropbox and Microsoft OneDrive. However, the outsourcing of sensitive data to third parties is inevitably risky; data losses with financial consequences, such as through theft by cyber criminals, cannot be ruled out with certainty.

The number of objects connected to the internet is rapidly growing: The trend of using so-called "smart objects" (also known as the "Internet of things") refers to everyday objects such as mobile phones and toothbrushes, but also to houses that react autonomously to their environment or even industrial plants with Internet-controlled sensors. Smart technologies will also be key elements of "smart cities", whose entire urban environments are equipped with sensors that make all recorded data, f.i. traffic movements, available in a cloud. Risks are posed not only by the increasing dependence on functioning Internet access, but also by the limitless recording and collection of sensitive data. As a consequence, new targets for cybercriminals are increasingly emerging.

2. Typology of Cybercrime

The term cybercrime is not legally defined and covers a wide range of criminal offences. One approach can be found in the Convention on

Cybercrime of the Council of Europe, known as the Budapest Convention.[4] Art. 2 ff distinguishes between four different types of criminal offences:

1. Offences against the confidentiality, integrity and availability of computer data and systems:[5] f.i. hacking computer systems or denial of service attacks;
2. Computer-related offences:[6] f.i. identity theft, phishing and other forms of online fraud and forgery;
3. Content-related offences:[7] f.i. distribution of child sexual abuse material, incitement to racial hatred, incitement to terrorist acts and glorification of violence, terrorism, racism and xenophobia;
4. Copyright-related offences:[8] f.i. unauthorized music and movie sharing on internet platforms.

The typology is not wholly consistent. Categories 1,3 and 4 focus on the object of legal protection, whereas the computer-specific category 2 focuses on the method used to commit the offences in question. As a result, some forms of offences in category 2 seem to overlap with the other categories; f.i. phishing also fits into category 1.

3. Challenges in Fighting Cybercrime

Compared to the offline environment, the fight against crime in the cybersphere poses particular challenges.[9].

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[4] Convention on Cybercrime of the Council of Europe (CETS No.185), available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>.

[5] Art. 2 (Illegal access), Art. 3 (Illegal interception), Art. 4 (Data interference), Art. 5 (System interference), Art. 6 (Misuse of devices).

[6] Art. 7 (Computer-related forgery), Art. 8 (Computer-related fraud).

[7] Art. 9 (Offences related to child pornography).

[8] Art. 10 (Offences related to infringements of copyright and related rights).

[9] United Nations Office on Drugs and Crime (UNODC), Comprehensive Study on Cybercrime, Chapter one, <https://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.4_2013/CYBERCRIME_STUDY_210213.pdf>.

First of all, cybercrime became a service-based industry and is easily accessible for every Internet user.[10] For instance, botnets are available for rental on the darknet at a low price; the offer comprises of thousands of infected computers of random people worldwide. Without their knowledge the infected computer systems are used for denial-of-service-attacks, disrupting the system of a target, for instance the website of a company or a state entity. Furthermore malware can be easily obtained and used for highly destructive attacks worldwide, just by sending them as an e-mail attachment to various targets. Thus, the cybersphere allows for attacks with huge and worldwide damages without expert knowledge and at a low cost.

In addition, the Internet is undergoing rapid developments and cybercriminals are constantly developing their tools and methods. Vulnerabilities in a software or operating system are often detected early and exploited immediately. Law enforcement agencies are therefore under pressure to keep up with technical developments.

Another challenge is posed by anonymization technologies.[11] Internet users often have a legitimate interest in the anonymous use of services. However, such technologies also pose a risk of misuse. This has been realised, for example, with the establishment of illegal trading platforms for weapons and drugs.

Finally, a challenging characteristic of cybercrime is its cross-border nature. The borderless structure of the Internet leads to attacks even from formerly under-connected areas of the world. As a result, the number of attacks increases. In addition, cross-border criminal investigations are more complex and less effective.

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[10] KSHETRI NIK, The Global Cybercrime Industry – Economical, Institutional and Strategic Perspectives, Springer 2010.

[11] International Communication Unity, Understanding Cybercrime : Phenomena, Challenges and Legal Response, Chapters 3.2.12 and 3.2.14, <https://www.itu.int/en/ITU-D/Cybersecurity/Documents/CybcrimeE.pdf>.

III. EU Regulatory Approaches

Within the European Union, the efforts for cybersecurity have been intensified at the latest since the large-scale cyber attack on Estonia in 2007 and were manifested in the EU cyber security strategy of 2013. Despite its limited legislative powers, the EU has adopted several legal acts on cybersecurity and cybercrime.

1. EU Competences and Strategies in the Field of Cybercrime

In the field of criminal law, the European Union has only limited legislative powers. Art. 83 I TFEU grants the Parliament and the Council the competence to lay down, by means of directives, minimum rules for the determination of criminal offences and penalties in areas of particularly serious crime, insofar as they have a cross-border dimension. Among the types of offences listed are terrorism, organised crime and computer-related crime. Beyond these limited harmonisation measures, the EU can only promote cooperation between Member States in the fight against crime. Art 84 TFEU excludes any harmonisation of member state provisions, particularly in the field of crime prevention.

Taking into account these limited competences, the European Commission presented a general cybercrime strategy in 2013. It provided an allover framework for EU initiatives to combat cybercrime and articulated the EU's vision of cyber security in terms of five priorities: Achieving cyber resilience, drastically reducing cybercrime, developing a cyber defence policy and capabilities , developing the industrial and technological resources for cyber-security and finally establishing a coherent international cyberspace policy for the EU and promoting core EU values.

The subsequent 2016 Action Plan formulated concrete measures to strengthen Europe's cyber security and resilience, amongst them: improvement of knowledge, education and training on cybersecurity; support of markets for cybersecurity products and services in the EU;

fostering cybersecurity investment; establishment of a public-private partnership with the industry to improve cybersecurity capabilities and innovation in the EU.[12]

2. Selected Legislations on Cybersecurity

Despite limited competences, the EU has in recent years adopted some important secondary legislations to combat cybercrime, the most important of which are mentioned below.

a. Security of Critical Infrastructure

A directive on security of critical infrastructure from 2016 lays down binding safety standards and reporting obligations for "operators of essential services" in the energy, transport, banking and health sectors and for drinking water supply.[13] On the basis of certain criteria, Member States must determine whether such services are essential on their territory for the maintenance of critical social or economic activities and whether a security incident would significantly disrupt their provision.

Some digital service providers, such as online marketplaces, online search engines and cloud computing services, must also take measures to ensure the security of their infrastructure and are required to report major incidents to national authorities. However, security and reporting obligations are less stringent for these providers. Micro and small enterprises are completely exempt from these obligations.

In addition, a strategic cooperation group has been established on the basis of the new regulations in order to exchange information and sup-

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[12] Carrapico Helena/Barrinha André, The EU as a Coherent (Cyber)Security Actor, in: Journal of Common MarketStudies 6/2017, p. 1254 ff.

[13] Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194, 19.7.2016, p. 1–30.

port Member States in capacity building in the area of Internet security. EU Member States are obliged to define a national network and information security strategy.

They also need to set up a network of Computer Security Incident Response Teams (CSIRTs) to deal with security incidents and risks, discuss cross-border security issues and find common answers (24/7 contact points).

b. Certification System for IT Products, Services and Processes

A new regulation from June 2019 introduces a security certification system for IT products, services and processes.[14] These certifications have the purpose to enable consumers to make informed choices and make it easier for companies to place safe products on the European market. However, this regulation does not oblige industry to use the new certification system; its use is voluntary. The Commission will regularly monitor the impact of the certification systems and assess the extent to which they are used by manufacturers and service providers.

Besides this, the new regulation extends the mandate of the Network and Information Security Agency (ENISA) and transforms it into a permanent EU Agency for Cyber Security, which is – amongst other tasks – in charge of the aforementioned certification system.

c. Fight against Illegal Online Content and Fake News

In March 2018, the European Commission published a Recommendation on operational measures for dealing with illegal online content.[15] According to the Commission, progress has been made in protecting Europeans

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[14] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), OJ L 151, 7.6.2019, p. 15–69.

[15] Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, OJ L 63, 6.3.2018, p. 50–61.

on the Internet, but Internet platforms need to step up their efforts to remove illegal content from the Internet faster and more efficiently. On the basis of this recommendation, the voluntary measures taken by businesses should be further strengthened before any legislative measures to supplement the existing legal framework are considered. The measures recommended by the Commission are detailed: Clearer reporting and redress procedures, use of proactive tools to detect and remove illegal content, safeguards for businesses to respect fundamental rights (freedom of expression, data protection) when removing content and closer cooperation with the authorities. With regard to the distribution of terrorist content online, the Commission recommends additional specific provisions, in particular an obligation to remove such content within one hour of its publication online.

In a Communication to the Parliament and the Council of April 2018, the European Commission set out its views on how to tackle disinformation on the Internet.[16] The Commission draws on the results of the latest Eurobarometer survey, according to which 83% of respondents said that "fake news" posed a threat to democracy. In particular, the deliberate disinformation aimed at influencing elections and immigration policy was considered by respondents to be of particular concern. In response, the Commission proposes the development of a code of conduct for businesses and the establishment of a network of factual auditors.

d. Countering Hybrid Threats

In 2006, the Commission reacted to the uprising of hybrid threats to the EU and its Member States with a respective Joint Framework.[17] The def-

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[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, 26 April 2018.

[17] Joint Framework on countering hybrid threats, JOIN(2016) 18 final, 6 April 2016 ; Joint stuff working document, Report on the implementation of the 2016 Joint Framework on countering hybrid threats and the 2018 Joint Communication on increasing resilience and bolstering capabilities to address hybrid threats, SWD(2019) 200 final.

inition of "hybrid threats" varies and mostly refers to actions conducted by state or non-state actors, whose aim is to undermine or to harm the target by influencing its decision-making at the local, regional, state or institutional level. Such actions are coordinated and synchronized and deliberately target democratic institutions' vulnerabilities. Activities can take place, for example, in the political, economic, military, civil or information domains. They are conducted using a wide range of means and are designed to remain below the threshold of detection and attribution.

Key elements of the Unions' strategy to counter hybrid threats are to strengthen the strategic communications to tackle disinformation on social media and other relevant channels and to establish a new sanctions regime to respond to hybrid attacks.

3. EU Cybersecurity Institutions

On the EU level there are currently four institutions dealing with the enhancement of cybersecurity, namely the European Cybercrime Center (EC3), the European Network and Information Security Agency, the European Defence Agency and the Computer Emergency Response Team for the EU Institutions, Agencies and Bodies. The tasks of these institutions overlap in certain regards, which is why they set up a cooperation in May 2018. In a Memorandum of Understanding the institutions agreed on leveraging synergies and promoting cooperation on cyber security and cyber defence. The cooperation comprises of exchange of information, education and training, cyber exercises, technical cooperation and strategic and administrative matters.

a. European Cybercrime Center (EC3), The Hague

The EC3 was launched in January 2013 to strengthen the law enforcement response to cybercrime in the EU and thereby to help protect European

citizens and businesses.[18] It is a subdivision of Europol, the law enforcement agency of the EU, and takes a three-pronged approach to the fight against cybercrime: forensics, strategy and operations.

EC3 has two forensics teams, digital forensics and document forensics, each of which focuses on operational support, and research and development.

There are two strategy teams, namely „outreach and support", which establishes partnerships and coordinates prevention and awareness measures, and „strategy and development", which is responsible for strategic analysis, formulation of policy and legislative measures and development of standardised training.

At the operations level, EC3 focuses on cyber-dependent crime, online child sexual exploitation and payment fraud. Since EC3 is a subdivision of an EU agency it does not have any executive power and supports Member States' investigations through coordination, advice and education.

b. European Network and Information Security Agency (ENISA), Heraklion

The European Network and Information Security Agency is an agency of the European Union, located in Heraklion/Greece and has been in operation since September 2005.[19] The agency supports the European Commission and the Member States in meeting the requirements of network and information security. It assists the Commission in developing respective

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[18] Communication from the Commission to the Council and the European Parliament, Tackling Crime in our Digital Age: Establishing a European Cybercrime Centre, COM/2012/140 final; official website with current information: <https://www.europol.europa.eu/>.

[19] Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act), OJ L 151, 7.6.2019, p. 15–69.

legislations and offers training and courses on network security matters. Like EC3 it does not have executive powers and therefore supports only through coordination and expertise.

c. European Defence Agency (EDA), Brusseles

The European Defence Agency (EDA) was set up in 2004 and is located in Brussels/Belgium.[20] It supports Member States in improving their defence capabilities through cooperation and acts as a coordinating body. It accompanies defence ministries in their projects to build a common defence capability. The EDA is also committed to strengthening the European defence industry and acts as an intermediary between military stakeholders in the EU and EU policies affecting defence.

The agency covers a broad range of topics: Harmonisation of requirements for the provision of operational capabilities, research and innovation for the development of technology demonstration systems and finally training and exercises in support of operations under the Common Security and Defence Policy. With regard to Internet security, the EDA deals, for example, with significant cyber attacks on critical infrastructures of the Member States and the Union.

d. Computer Emergency Response Team for the EU Institutions, Agencies and Bodies (CERT-EU), Brussels

After a pilot phase, the EU set up a permanent Computer Emergency Response Team (CERT-EU) for the EU institutions, agencies and bodies in 2012.[21] The CERT-EU is made up of IT security experts from the European

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[20] Council Decision (CFSP) 2015/1835 of 12 October 2015 defining the statute, seat and operational rules of the European Defence Agency, OJ L 266, 13.10.2015, p. 55–74.

[21] Arrangement between the European Parliament, the European Council, the Council of the European Union, the European Commission, the Court of Justice of the European Union, the European Central Bank, the European Court of Auditors, the European External Action Service, the European Economic and Social Committee, the European Committee of the Regions and

Commission, the Council, the European Parliament, the Committee of the Regions and the Economic and Social Committee. It cooperates closely with CERTs in the Member States and specialised IT security companies.

CERT-EU's mission is to contribute to the security of the ICT infrastructure of the EU institutions, bodies and agencies by helping to prevent, detect and respond to cyber attacks. [22]

IV. International Legal Framework

In the last 20 years, several international and regional organizations, amongst them the United Nations, the Council of Europe and the International Telecommunications Union have started developing instruments to enhance cybersecurity.[23] The activities of the organisations range from the establishment of expert groups and the provision of training and information to the development of regulations. There are currently 5 legally binding international regulations worldwide addressing the fight against cybercrime. Each of these instruments covers only certain regions of the world. There is no worldwide accepted legal framework to combat growing cyber threats.

1. Legally Binding Instruments to Combat Cybercrime

The existing international legally binding instruments to combat cybercrime seek to adress the growing challenge by harmonizing domestic criminal substantive law, improving investigative techniques provided in domestic criminal procedural law and increasing cooperation among the

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the European Investment Bank on the organisation and operation of a computer emergency response team for the Union's institutions, bodies and agencies (CERT-EU), OJ C 12, 13.1.2018, p. 1–11.

[22] CERT-EU's tasks are laid down in Art.2 of the Arrangement on CERT-EU (see FN 21).

[23] Noteworthy are f.i. the UN GGE « Voluntary, non-binding norms for responsible state behaviour in the use of information and communications technology », <https://www.un.org/disarmament/wp-content/uploads/2018/04/Civil-Society-2017.pdf>.

signature states. Cross-border investigation and use of electronic evidence, which is crucial to successful cybercrime prosecutions, is not covered by all of these instruments.

The first international treaty addressing cybercrime has been the Convention on Cybercrime, also known as the Budapest Convention.[24] It was drawn up by the Council of Europe and entered into force on 1 July 2014. As of August 2019, 63 states have signed and ratified the Convention. Amongst the signature states are the Council of Europe states with the exception of Russia. Furthermore 19 non–Council of Europe states have ratified the Convention, amongst them Australia, Canada, the Dominican Republic, Israel, Japan, Mauritius, Panama, Sri Lanka, and the United States. Important countries like Brazil, China and India are still not members to the Convention.

In the Middle East, the Arab League adopted the Convention on Combating Information Technology Offences in December 2010.[25] So far, it has been signed by most of the 22 Member States of the League. The convention's primary aim is to strengthen cooperation between states to enable them to defend against and protect their property, people, and interests from cybercrime.

The Commonwealth of Independent States (CIS) adopted the Agreement on Cooperation in Combating Offences Related to Computer Information in 2001.[26] 10 states have signed the Agreement, amongst them Russia, Azerbaijan, Ukraine and Moldova. The agreement specifies that the cooperation between the parties of this framework shall be conducted directly between the competent authorities, based on requests for assistance

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[24] Convention on Cybercrime of the Council of Europe (CETS No.185), available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185>.

[25] Arab Convention on Combating Technology Offences, available at: <https://dig.watch/instruments/arab-convention-combating-technology-offences>.

[26] Agreement on cooperation among the States members of the Commonwealth of Independent States in combating offences relating to computer information, available at: <https://dig.watch/instruments/agreement-cooperation-combating-offences-related-computer-information-commonwealth-independent>.

made by the competent authorities, which another party may refuse to execute if it would be contrary to its national legislation. For this purpose the agreement lists forms of cooperation that signatories engage in.

The Shanghai Cooperation Organization concluded the Agreement on Cooperation in the Field of International Information Security in 2009.[27] The Agreement was initially signed by 6 of its currently 8 Member States, namely Kazakhstan, China, Kyrgyz Republic, Russia, Tajikistan, and Uzbekistan. The agreement's focus extends beyond cybercrime and cybersecurity to include information security of Member States as one of its primary objectives, as well as national control over systems and content.

The African Union adopted the Convention on Cybersecurity and Personal Cybersecurity in 2014.[28] As of August 2019, it has been signed by 14 of the Union's 55 members and ratified by 5.[29] The Convention imposes obligations on Member States to establish legal, policy and regulatory measures to promote cybersecurity governance and control cybercrime.

2. Budapest Convention

Among the aforementioned international legally binding agreements, the Budapest Convention is the most important instrument with the widest degree of harmonisation and the biggest impact radius with 63 Member States.

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[27] Agreement between the Governments of the Member States of the Shanghai Cooperation Organization on Cooperation in the Field of International Information Security, available at: <https://ccdcoe-admin.aku.co/wp-content/uploads/2018/11/SCO-090616-IISAgreement.pdf>.

[28] African Union Convention on Cyber Security and Personal Data Protection, available at: <https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf>.

[29] On the ratification process and challenges regarding the implementation: Uchenna Jerome Orji, The African Union Convention on Cybersecurity: A Regional Response Towards Cyber Stability?, available at : <https://www.researchgate.net/publication/327986841_The_African_Union_Convention_on_Cybersecurity_A_Regional_Response_Towards_Cyber_Stability>.

The convention consists of three parts. The first part deals with the harmonisation of substantive criminal law. The aim is to avoid criminal safe harbors by criminalizing common types of cybercrime in all Member States in the same way. The catalog of offences comprises attacks against computer systems and networks as well as crimes commited via computer systems and/or the Internet. Among those offences are: Illegal access to a computer system, production and distribution of computer misuse tools, computer-related fraud and intellectual property offences.

The second part of the Convention concerns the harmonization of procedural criminal law. The aim is to enable or enhance global evidence collection. On the basis of the principle of territoriality, a state (or its law enforcement authorities) can only do investigation within its own territory. Therefore mutual assistance is of great importance. The harmonization of procedural law aims at facilitating the mutual assistance. For this purpose the second part of the Convention provides for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences. Among these powers is the preservation and disclosure of traffic data, search of stored computer data and real-time collection of computer data.

The third part of the Convention aims at setting up a fast and effective regime of international cooperation in order to minimise obstacles to the access to information and evidence. In this respect, the third part of the Convention includes provisions on mutual assistance, extradition, expedited preservation of stored computer data and the establishment of a 24/7-contact point in all signature states.

Noteworthy is the provision on transborder access to stored computer data, it allows limited transborder access to data without the official neutral assistance procedure. This a certain exception to the Principle of Territoriality. Under this provision, the law enforcement autorities of a signature state may, without the authorisation of another signature state: (1) access publicly available stored computer data, in another signatory state; (2) access or receive, through a computer system in its territory,

stored computer data located in another state, if it obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system. In practise, this means that law enforcement authorities can (1) use openly accesible information on websites in other signature states as evidence and (2) can directly ask information from Internet service providers in other signature states and use the information as evidence if it is legally disclosed by the service provider. A possible situation under the second constellation would be: A suspected drug trafficker is lawfully arrested while his/her mailbox – possibly with evidence of a crime – is open on his/her tablet, smartphone or other device. If the suspect voluntarily consents that the police accesses the account and if the police are sure that the data of the mailbox is located in another Party, police may access the data.[30]

The guidance note of the Council of Europe concerning this article indicates, though, that service providers are unlikely to be able to consent validly and voluntarily to the disclosure of their users' data under this provision. Normally, service providers would only be holders of such data; they would not control or own the data, and they would, therefore, not be in a position to validly consent.[31] As a result, in a constellation that an Internet Service Provider might obtain evidence, only the standard mutual assistance procedures would apply and be the best solution to obtain cross-border evidence.

Despite the remaining technical limitations, the Convention provides a far-reaching basis for harmonising the relevant criminal law and for improving international cooperation in criminal prosecution.[32]

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[30] Council of Europe, T-CY Guidance Note #3 (Transboarder access to data (Article 32)), p. 4, <https://rm.coe.int/16802e726a>.

[31] Council of Europe, T-CY Guidance Note #3 (Transboarder access to data (Article 32)), p. 7, <https://rm.coe.int/16802e726a>.

[32] Seger Alexander, Enhanced cooperation on cybercrime, <https://www.ispionline.it/it/pubblicazione/enhanced-cooperation-cybercrime-case-protocol-budapest-convention-20964>.

In reaction to the misuse of social media, an additional Protocol to the Convention was adopted in 2006 in order to criminalize the dissemination of racist and xenophobic material through computer systems, as well as threats and insults motivated by racism or xenophobia.

V. Perspectives

Current legislative activities at the International and EU level aim at facilitating cross-border law enforcement. The focus is on securing electronic evidence at short notice, such as e-mails or the identity behind an IP address. With regard to the often cross-border nature of cybercrime, the principle of territoriality leads to delays in the cross-border preservation of evidence. The official way of mutual assistance via state entities can take a long time. It is therefore helpful if law enforcement authorities can cooperate directly with Internet service providers in obtaining evidence. The Budapest Convention in its current version allows direct contact with Internet service providers in other signature states. Foreign law enforcement authorities, however, have no right to recover evidence, which is why the obtaining of evidence in an individual case may depend on the willingness of the Internet service providers to cooperate. In order to facilitate the cross-border extraction of electronic evidence, legislative proposals are currently under discussion at the level of the Council of Europe and the European Union:

The Council of Europe is negotiating a Second Additional Protocol to the Budapest Cybercrime.[33] The following elements are being discussed as part of it:

- Provisions for more effective mutual legal assistance, in particular: a simplified regime for mutual legal assistance requests for sub-

[33] On the background and drafting process: Council of Europe, Enhanced international cooperation on cybercrime and electronic evidence: Towards a Protocol to the Budapest Convention, <https://rm.coe.int/t-cy-pd-pubsummary-v6/1680795713>. See also: SEGER ALEXANDER, "Grenzüberschreitender" Zugriff auf Daten im Rahmen der Budapest Konvention über Computerkriminalität, in: Zeitschrift für öffentliches Recht 73/2018, pp. 71-85.

scriber information; international production orders; direct cooperation between judicial authorities in mutual legal assistance requests; joint investigations and joint investigation teams; audio/video hearing of witnesses, victims and experts; emergency mutual legal assistance procedures;
- Provisions facilitating direct cooperation with service providers in other jurisdictions with regard to requests for subscriber information, preservation requests, and emergency requests;
- Clearer framework and stronger safeguards for existing practices of transborder access to data;
- Safeguards, including data protection requirements.

Meanwhile, the European Commission also adopted legislative proposals on new instruments for Member State authorities to claimdirect access to electronic evidence from Internet service providers for investigation purposes and as evidence in court proceedings: In April 2018, the Commission presented a proposal for a Regulation on European orders for the issuance and safeguarding of evidence in criminal matters.[34] The Regulation aims at regulating how and under which conditions law enforcement authorities of Member States may require service providers offering their services on Union territory to surrender or not delete certain electronic data held by the service provider so that such data can be used as evidence in pending criminal proceedings. This may include, for example, data on the content and sending of e-mails. On the same date, the Commission presented a proposal for a Directive establishing common rules for the appointment of legal representatives of service providers and facilitating access to evidence in criminal matters.[35] In addition, the Com-

[34] Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 final.

[35] Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, COM/2018/226.

mission has started negotiations with the United States on an agreement to accelerate access to electronic evidence by US service providers in EU Member States and vice versa.[36]

The initiatives to intensify direct cooperation between law enforcement authorities and Internet service providers in other States are particularly noteworthy since the existing provision in the Budapest Convention already constitutes an obstacle for some states to accede to the Convention. Russia in particular has pointed to a violation of national sovereignty in this respect. One can assume that an extension of the provision of Art. 32 Budapest Convention would make an accession to the Budapest Convention even less attractive for countries such as Russia, Brazil and China. As these countries have also recognised the need for a global instrument to combat cybercrime, Russia and China, together with the Shanghai Cooperation Organisation, submitted a proposal for an "International Code of Conduct for Information Security" [37] to the UN General Assembly in 2011.

No global support was given to the proposal as it contained a number of controversial aspects, namely the introduction of an intergovernmental system for Internet governance, instead of the existing multistakeholder-system. Another point of criticism was the highlighting of the principle of sovereignty in cyberspace which in effect prevents cross-border cooperation with Internet service providers and, as some scholars note, could be a way to legitimize censorship. A revised version of the proposed Code from 2015 did not include major changes and obviously hasn't found global support until today. A globally applied instrument to combat cybercrime, in particular to facilitate electronic evidence collection, is therefore not in sight for the time being.

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[36] Council Decision authorising the opening of negotiations with a view to concluding an agreement between the European Union and the United States of America on cross-border access to electronic evidence for judicial cooperation in criminal matters, 6 June 2019, Council Doc. 10128/19.

[37] Proposal « International Code of Conduct for Information Security », available at: <https://digitallibrary.un.org/record/786846>.

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